

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

PROFESSIONAL REFEREE
ORGANIZATION, INC.,

Employer

- and -

PROFESSIONAL SOCCER REFEREES
ASSOCIATION,

Petitioner.

NLRB Case 02-RC-281723

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PETITIONER'S CLOSING ARGUMENT

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I. SUMMARY.

The National Labor Relations Act, 29 U.S.C. § 151, *et. seq.* (“NLRA” or the “Act”) was enacted to encourage “the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151. This is precisely the modest goal of the professional soccer officials in this matter – to have the opportunity to negotiate over their terms and conditions and employment. Right now, as it stands and as the record in this matter aptly demonstrates, the soccer officials in the petitioned-for unit (“Petitioned-For Officials”) are not provided the opportunity, nor do they have the ability under the current structure, to negotiate their terms of employment, including rates of pay. Instead, as the evidence shows, their rate of pay is unilaterally dictated to them by the Respondent Professional Referee Organization, Inc. (“PRO” or “Respondent”). Moreover, as is often the case in the modern United States economy, the Petitioned-For Officials are misclassified as independent contractors by PRO despite Respondent’s near-total control over the Petitioned-For Officials’ work lives.

The Respondent employer, PRO, controls and engages in its own recruitment of the Petitioned-For Officials. PRO maintains and exercises total control over assignment of the Petitioned-For Officials to work matches in the National Women’s Soccer League (“NWSL”), the United Soccer League (“USL”), and Major League Soccer (“MLS”) (collectively “Leagues”). PRO requires the Petitioned-For Officials to inform it of their availability to work matches and notice of these assignments is effectuated through an electronic platform created and administered by Respondent. These aspects substantially restrict the Petitioned-For Officials’ entrepreneurial opportunity to make more money elsewhere so long as they work for Respondent. PRO has

categorized the Petitioned-For Officials into distinct tiers within its structure, and each tier carries with it specific expectations and opportunities, which are established and enforced by Respondent. Moreover, PRO maintains complete control over promotion or demotion within the respective tiers (and possible promotion to a bargaining unit of PRO soccer officials represented by Petitioner), and the record demonstrates it utilizes movement downward in the tiers as a means of discipline.

PRO also controls the training of the Petitioned-For Officials. In so doing, PRO requires the Petitioned-For Officials to attend an annual preseason training camp as well as monthly webinars. In addition, Respondent controls the continuing education of the Petitioned-For Officials – each of whom are assigned Coaches by PRO. These Coaches monitor the Petitioned-For Officials’ performance, provide feedback for job improvement, and instruction for officiating, including specific guidance on matters such as positioning on the field and types of fouls. PRO even controls the physical fitness of the Petitioned-For Officials by mandating workout regimens and dictating compliance with requirements to continually upload physical monitoring data to PRO’s Sports Scientist using a platform developed and administered by PRO.

Respondent controls the Petitioned-For Officials’ travel to and from matches it has assigned and distributes travel policies applicable to the Leagues. In addition, if a travel or expense reimbursement issue arises, the Petitioned-For Officials are instructed to contact PRO and not the respective Leagues. In similar fashion, PRO controls the Petitioned-For Officials’ match day and post-match procedures, including requirements to submit post-match and supplemental post-match reports. PRO maintains a detailed performance evaluation and assessment system whereby the Petitioned-For Officials are provided per game, mid- and end-of-season evaluations and are required to submit electronic self-evaluation documentation to Respondent.

Moreover, PRO maintains significant control over the tools and instrumentalities of the

profession. For example, Respondent provides uniforms to be worn on-field when the Petitioned-For Officials work MLS matches and requires a PRO-II badge to always be worn when the Petitioned-For Officials are officiating matches in both NWSL and USL. PRO also provides electronic communication devices to the Petitioned-For Officials to be used during matches, which includes provision and payment for a sophisticated ear mold fitting process to promote wearability. Additionally, PRO provides certain tiered Petitioned-For Officials with a GPS equipped watch and heartrate monitor to facilitate compliance with Respondent's fitness and fitness-tracking requirements.

The Petitioned-For Officials are engaged in the distinct occupation of professional soccer officiating, which is controlled by PRO and not the Leagues. In fact, as Respondent has conceded, the sole purpose for the creation of PRO was to train and employ professional soccer officials to officiate professional soccer matches. This is because the various leagues and teams are prohibited by soccer's governing body, FIFA, from directly employing the Petitioned-For Officials. It is without dispute professional soccer officiating requires significant skill and the work is performed under the direction of Respondent with many of the Petitioned-For Officials having been with PRO for multiple years.

Yet, despite these facts and the record evidence supporting a finding of employee status, PRO contends the Petitioned-For Officials "are not employees" of PRO. Case law is clear that the party alleging an exception to employee status (here PRO) has the burden of proof in establishing that claim. To support its argument, PRO argues the Petitioned-For Officials have "no economic relationship with PRO." And in fact, PRO takes it a step further with the claim that the Petitioned-For Officials cannot even be considered independent contractors because they "perform no services for, or on behalf, of PRO." But the evidence flatly contradicts that claim by showing

Respondent pays the Petitioned-For Officials directly on a regular basis when they officiate MLS matches; and when it does not pay them directly for work in the NWSL or USL, *still* PRO substantially controls the amount and manner of payment – and it even resolves disputes over pay. Moreover, the record shows PRO advocates with the respective Leagues to establish rates of pay for the Petitioned-For Officials for work in the NWSL and USL. In addition, NWSL provides hundreds of thousands of dollars in funding annually to PRO to support officiating in its league. This allows for no other conclusion than there is, in fact, a *demonstrable* economic relationship between PRO and the Petitioned-For Officials.

Relevant NLRB case law, discussed more fully herein, has held similarly situated sports officials to be employees of the entity that assigns them, and in so doing, found that employee status does not require the individual to be paid directly by the employer where the employer exercises substantial control, as PRO does here, over the terms and conditions of employment, including compensation. Moreover, the record readily demonstrates PRO is the sole source of *all* meaningful control over the working lives of the Petitioned-For Officials when such control is analyzed in the context of the relevant factors used by the Board to distinguish employees from independent contractors. As the Eleventh Circuit Court of Appeals has astutely noted, there is a “time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it’s a duck.” *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1327 (11th Cir. 1998). Here, as the evidence establishes, the Petitioned-For Officials walk, whistle, and look like statutory employees of PRO. Therefore, when the facts of this matter are analyzed in congruence with the relevant law, the Region may appropriately find employee status and order an election so these American workers will not be denied their statutory right to organize any longer.

II. ISSUE.

The Region directed the following issue: “Whether the soccer officials in Tiers A, B, and C are employed statutory employees of the Professional Referee Organization, Incorporated.” (Tr. 14:19; 258:3-6)¹.

In addition, the Petitioner must “show that the unit is appropriate and why Tier D is not included in the petitioned for unit.” (Tr. 15:1-3).

Last, the following issues were *fully resolved* in the hearing, on the record by way of party statement or stipulation:

- Compliance with Petitioner’s pre-hearing subpoena. (Tr. 199:15-200:20).
- Exclusion of Tier D from the Petitioned-For unit. (Petitioner at: Tr. 258:16; Employer at: 258:14).
- If the Petitioned-For Officials (PRO2 Tiers A-C) are found to be statutory employees, the Petitioned-For Unit is appropriate. (Employer at 9: 23; 260:5-9)
- A mail ballot election. (Petitioner at: Tr. 258:20; Employer at: 259:11-224).

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¹ Citations to the transcript of the investigative hearing shall be by witness name or “Tr.” followed by page and line numbers; Citations to exhibits shall be, for Board Exhibits: “BX-”; for Joint Exhibits: “JX-”; for Petitioner exhibits: “PX-”; for employer exhibits: “EX-” – followed by designated number of exhibit.

III. FACTS.

1) Factual Background.

PRO was incorporated in 2012 for the purpose of delivering the professional soccer referee program in the U.S. and to improve the quality of professional refereeing in North America through training administered by the program. PRO exists “to employ ... those officials working primarily in Major League Soccer.” (Webb 24:1-11). PRO recruits, employs, trains, assigns, supports, and advocates for soccer officials. (Webb 24:1-4).

In 2015, PRO formed a development group and “took responsibility for assigning certain games that previously would have been assigned by ... other assigners.” (Webb 31:20-22). PRO invested “resources into the creation of [a] training program ... to give the officials ... the best opportunity to develop.” (Webb 31:24-32:2). The development group was rebranded as PRO2 in 2020. (Webb 32:14-15). PRO2’s mission statement is to identify, train, and develop future professional match officials and provide quality officiating in the leagues to which PRO assigns. (Webb 115:18-22); (<http://proreferees.com/pro2/pro2-mission-statement/>). PRO2 is not a corporation or limited liability company unto itself; it is just a division of PRO. (Webb 123:15).

Early on, PRO’s development group implemented a tier system for soccer officials (Elite Tier, Elite Development Tier, and Premier Tier). (Webb: 34:4-10); (PX-1). Training, fitness, education, and assessment and evaluation requirements for each tier were published by PRO. (PX-1). In 2020, the tier system was adjusted to create tiers A (previously Elite Tier), B (previously Elite Development Tier), C (previously Premier Tier), and D (previously training tier). (Webb 33:24-34:10; 38:15-16). PRO provides varying levels of support including access to sports scientists, personal development plans, and tailored coaching; has varying levels of expectations and opportunities; and has varying requirements for soccer officials based on their tier

classifications and whether they are Referees or Assistant Referees. (Webb 34:11-38:18); (PX-2); (PX-20); (PX-37).

There are four types of soccer officials: Referee, Assistant Referee, Fourth Official, and Video Replay Officials. The Referee “is in charge of managing all the matches, participants, including players and coaches, enforcing the rules of the game, and managing the overall execution of ... a game.” (Franz 129:7-10). Assistant Referees “assist the head referee with decisions around the edge of the field.” (Franz 129:13-14). The Fourth Official “assists with administrative aspects of the game and ... the participants who are outside of the field of play.” (Franz 129:14-16). Some professional games make use of off-field officials known as video replay officials. (Franz 129:17-18).

In PRO2, Tier A is the highest tier, and tier D is the lowest. As officials move up in the tiers, they are “exposed to some additional support and resources from [PRO], with the intention of ... moving [them] through to A and then ultimately into the ... bargaining unit.” (Webb 37:11-15). Tier A Referees and Assistant Referees “are the closest to being ... offered an employment contract within ... the [current Bargaining Unit] ... [and] going to work in... Major League Soccer.” (Webb 34:11-14). Tier B Referees and Assistant Referees are “people moving ... in the right direction through the ... path.” (Webb 37:5-6). They have shown “ability,” “aptitude,” and “promise.” (Webb 37:9-10). Tier C is “not quite entry level,” but “really is the first level ... where [soccer officials] get some direct support from [PRO].” (Webb 38:5-10). Tier D was previously called the “training tier.” (Webb 38:15-16).

PRO’s development group, now referred to as PRO2, has steadily grown since its inception. As it has matured in this respect, the level of control exercised by Respondent over the work lives of the Petitioned-For Officials has steadily increased to a level commensurate with a finding of

employee status.

2) **PRO Exercises Great Control over the Petitioned-For Officials' Work.**

a) **PRO Controls Recruitment.**

The record shows PRO is in control of *recruitment* of officials for populating PRO2.

The testimony of PRO's only witness, General Manager Howard Webb ("GM Webb" or "Webb"), demonstrates there is no dispute PRO selects for the PRO2 group individuals "with good prospects and potential." (Webb 100:24). There are individuals PRO decides not to include in the PRO2 group. (Webb 101:4). And, as stated by Webb, PRO has "seen a lot of successful people coming through the ranks [of PRO2] and making it into the ... employed ranks ... of the bargaining unit". (Webb 34:19-35:4).

The Petitioned-For Officials are recruited by PRO staff. Tier C Referee Mathew Franz ("Referee Franz") began his employment relationship with Respondent when he was first contacted by Sandra Serafini of PRO in 2014. (Franz 128:21; 130:3). Tier B Assistant Referee Thomas Felice ("AR Felice") has been employed with Respondent since 2015 when he received an assignment from a PRO employee. (Felice 206:8; 203:20-204:2).

Admitted exhibits establish that the Petitioned-For Officials are assigned "scouts" and "endorsers" by PRO as PRO-sourced documents show. (PX-48-010).

b) **PRO Controls Training.**

The record shows PRO is in control of *training* of the Petitioned-For Officials.

The testimony of GM Webb demonstrates there is no dispute that the "primary support" PRO provides to the Petitioned-For Officials is "coaching." (Webb 40:6). It is also undisputed PRO trains the Petitioned-For Officials through, among other avenues, monthly "webinars" and "group discussions." (Webb 40:12).

PRO requires the Petitioned-For Officials to attend scheduled training. (Franz 143:6); (Felice 211:15). To this end, the Respondent requires the Petitioned-For Officials to attend pre-season training camps. (Franz 143:9:); (Felice 211:18). The Petitioned-For Officials' attendance was even required at the 2021 preseason training camp that was held virtually due to COVID-19. (Franz 144:14); (Felice 212:16).

Admitted exhibits expressly document PRO's training expectations of the Petitioned-For Officials. (PX-2); (PX-4 - "Complete post training and training sessions after match"); (PX-20); (PX-37).

c) PRO Controls Education.

The record demonstrates Respondent controls the professional soccer officiating *education* of the Petitioned-For Officials.

GM Webb's testimony demonstrates there is no dispute PRO Coaches continually monitor job performance of the Petitioned-For Officials. (Webb 98:22). PRO Coaches provide suggestions to the Petitioned-For Officials for job improvement. (Webb 99:1). Moreover, Respondent provides instructions to the Petitioned-For Officials on various soccer officiating mechanics, including positioning on the field. (Webb 99:18). PRO also provides *specific direction* to the Petitioned-For Officials on how to recognize and adjudicate certain types of fouls that occur during the matches for which they are assigned. (Webb 100:12).

Furthermore, Respondent requires the Petitioned-For Officials to attend monthly webinars. (Franz 147:14; 148:8); (Felice 214:11). PRO also provides the Petitioned-For Officials with written presentations that outline expectations and preferred methods of completing their work. (Franz 168:4). Moreover, PRO provides the Petitioned-For Officials with specific guidance on how to interpret FIFA laws. (Franz 186:20).

Admitted exhibits establish PRO has published its preferred methods of work performance to the Petitioned-For Officials, for example, via the document titled “Some positioning Thoughts.” (PX-12); (Franz 168:20); *see also*, (PX-2); (PX-20); (PX-37).

d) PRO Controls and Continually Monitors the Petitioned-For Officials’ *Fitness*.

The record demonstrates Respondent maintains control of the Petitioned-For Officials’ *fitness*.

GM Webb’s testimony demonstrates there is no dispute that PRO’s Sports Scientist, John Westbrooks, works with the Petitioned-For Officials to ensure their fitness supports professional soccer officiating. (Webb 47:2). Moreover, the Petitioned-For Officials are “required [by FIFA regulations] to take a [fitness] test ... once a year.” (Webb 49:3). And, as Referee Franz explained, this testing process is facilitated by PRO:

PRO either organizes the fitness testing themselves, such as at a pre-season camp. Officials usually take it there. Or [PRO] sends a designated representative to observe fitness testing if it’s also being held in conjunction with another organization.

(Franz 149:11-14). PRO requires the Petitioned-For Officials to complete this fitness test to be eligible to officiate. (Franz 148:20).

In addition, Respondent requires the Petitioned-For Officials to comply with an ongoing fitness plan throughout each season, which includes among other things, requirements to perform workouts during the season. (Franz 149:23). PRO’s sports science team provides the Petitioned-For Officials with workouts to be performed. (Felice 215:10). Further, the Petitioned-For Officials are required by Respondent to track their workouts throughout the season. (Franz 150:8); (Felice 215:15). Additionally, PRO facilitates the Petitioned-For Officials’ compliance with its required fitness program through provision of access to a smartphone application and website to report their

fitness data. (Franz 150:15). And, as explained by Referee Franz, PRO requires the Petitioned-For Officials to submit results of fitness training at least twice per week to its Sports Scientist, John Westbrooks (Franz 150:1).

PRO requires me to submit -- as a Tier C referee in 2021, PRO requires me to submit the results of my fitness training at least twice a week to their sports scientist. ... Usually the ... fitness and wellness tracking begins just prior to the start of the season and runs continuously throughout the season, and at the end of the season even when we're not assigned to a PRO match. ... PRO provides us access to a phone application or a website where we can either enter data directly on our workouts, or it contains a link to an online forum where we submit that data that goes into a database that PRO maintains.

(Franz 150:1-18). The Petitioned-For Officials are *not* required to supply their fitness data to NWSL, USL or MLS – only PRO. (Franz 153:5); (Felice 218:3). PRO requires, as explained by Referee Franz, the Petitioned-For Officials to submit two types of fitness data: fitness monitoring and AM (morning) wellness checks.

So there's two types of data that we submit. There's the fitness monitoring data that we submit after our training, at least twice per week, contains data on the duration of our workout, the temperature of the workout, how we felt while training. And it's sort of a mode of what kind of workout it was, either upper body or run or -- and how long we did that exercise for. ... The AM wellness check is a daily ... electronic diary that we are required to submit to PRO ...

(Franz 150:21-1518). AR Felice confirmed this requirement's applicability to Respondent's Assistant Referees as well: "[The AM wellness check] is a separate survey we fill out every morning saying how ... long we slept, how well we slept, what our level of soreness is, and our energy level." (Felice 216:3-10).

Respondent also maintains a specific COVID-19 policy, which contains health and safety protocol that must be followed by the Petitioned-For Officials. (Franz 166:2-5); (Webb 59:18-22); (PX-10 at 4-7). Respondent's COVID-19 policy also includes a testing requirement for the Petitioned-For Officials, and if a Petitioned-For Official does not comply with PRO's COVID

testing policy they will be removed from their match assignment without pay. (Franz 166:20 - “If we do not comply with that procedure, we are removed from the assignment without pay”).

Admitted exhibits establish PRO published “PRO2 sports science fitness requirements” to the Petitioned-For Officials. (PX-4). Moreover, admitted exhibits establish PRO published its “2020 PRO2 Fitness testing” requirements (PX-28) and its COVID risk mitigation information to the Petitioned-For Officials. (PX-33). *See also*, (PX-2); (PX-10); (PX-11); (PX-20); (PX-30); (PX-32); (PX-37); (PX-47); (PX-49).

e) **PRO Controls Travel.**

The record shows PRO controls the *travel* of the Petitioned-For Officials when they are required to travel to work PRO-assigned matches or other PRO required events, such as training camps.

GM Webb’s testimony establishes there is no dispute the Petitioned-For Officials’ travel is coordinated through a “platform” designed and administered by Respondent. (Webb 68:11).

PRO instructs the Petitioned-For Officials to contact PRO’s designated travel agent, Sportcorp, for all travel and Sportcorp arranges airfare, hotel, and travel logistics. (Franz 146:8); (Felice 213:17). When working either NWSL or USL matches for Respondent, the Petitioned-For Officials “fill out a template expense form ... made available to [them] on PRO’s shared electronic drive. [The Petitioned-For Officials] fill out the templated form with [their] expenses for the match, and then, submit that expense form to the respective league in which” they worked for PRO. (Franz 156:3-8). When the Petitioned-For Officials work MLS matches for PRO, they “submit an expense report directly to PRO” and are “reimbursed directly by PRO through the ArbiterPay system.” (Franz 160:25-161:3). Moreover, if any issues arise with “missing match fees” or “missing expenses”, the applicable PRO handbooks require the Petitioned-For Officials to contact a

specified PRO staff member depending on the league in which the match was worked.

For NWSL matches:

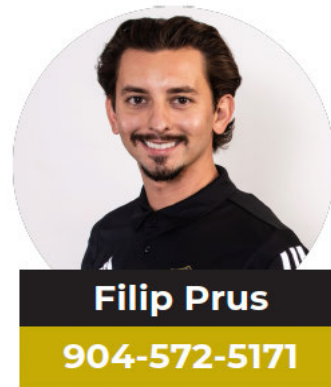
For USL matches:



Amy.Edwards@proreferees.com

Contact for:

- PROsphere (Assignments)
- Travel Disruptions
- Team XStream Video
- Wyscout Reports
- Missing NWSL Match Fees
- Missing NWSL Expenses
- Misc. NWSL Questions



Filip.Prus@proreferees.com

Contact for:

- PROsphere
- Travel
- Missing Match Fees
- Missing Expenses
- Vokkero (Tiers A-C)
- PROhouse
- COVID Test Kit Orders
- Misc. USL Questions

(Franz 156:12); (PX-10 at 002); (PX-11 at 002). Notably, the Petitioned-For Officials do not contact the respective leagues for travel-related issues. PRO also requires the Petitioned-For Officials to wear PRO-provided track suits and polo shirts when traveling to and from matches or other PRO-required work. (Franz 140:23-141:3).

The admitted exhibits establish PRO maintains travel and expense policies applicable to PRO2 Officials. (PX-5); (PX-6); (Franz 155:10).

f) PRO Controls Match Day Protocol and Procedures.

The record demonstrates PRO maintains control over the Petitioned-For Officials as related to *match day protocol and procedures*.

First, PRO maintains policies applicable to the Petitioned-For Officials, which set forth specific arrival and departure times into both the venue city and at the arena prior to working a

match. Those same policies mandate that Alex Prus, Director of PRO2 Match Officials, “will review deviations from these travel protocols.” (PX-5 at 002); (PX-6 at 002).

Second, the Petitioned-For Officials are required by Respondent to engage in significant post-match work, which includes the drafting and submission of a “match report” (Webb 81:18).

Referee Franz explained the process of PRO-mandated match reporting:

At the conclusion of every PRO-assigned match, the referee, in coordination with the rest of the ... assigned officials, fill out a match report that details the result of the game, administrative details of the game, including who officiated it, when and where, details regarding disciplinary sanctions that were taken during the game. And then, we complete this match report and upload it to PRO’s managed shared drive before leaving the locker room at conclusion of the match.

(Franz 170:23-171:6). In addition, there are instances whereby the Petitioned-For Officials are instructed by PRO to submit a supplemental match report in draft form, which requires PRO’s express approval prior to formal submission. As testified to by Referee Franz, a “supplemental report is required when there is ... an unusual, or egregious, incident that happens during a soccer match.” (Franz 171:14-16). For both NWSL and USL supplemental match reports, PRO instructs the Petitioned-For Officials to “email their Supplemental Report to Erich Simmons and Mark Kadlecik and copy Alex Prus ... [and that the] Officials will have 24 hours to upload their Supplemental Report into Box after PRO2 approval.” (PX-13); (PX-14). Petitioner’s Exhibit 15 provides an example of Referee Franz seeking and receiving PRO approval prior to formal submission of a supplemental match report. (PX-15); (Franz 173:22-25 - stating, “This is a draft supplemental report that I submitted for approval for the PRO process.”). The record of admitted exhibits establishes PRO has published explicit instructions to the Petitioned-For Officials with respect to PRO’s required post-match duties. (PX-4); (PX-13); (PX-14); (Franz 172:22); (PX-15); (Franz 173:22); *see also*, (PX-2); (PX-20); (PX-39); (PX-40); (PX-41); (PX-42); (PX-43).

Third, the record clearly establishes PRO instructs the Petitioned-For Officials on how they

should officiate matches in the leagues assigned by PRO. (Franz 148:13-15 - “There’s often specific points of emphasis in a given league or slight variations in the rules of competition that PRO instructs us on that are relevant to each league.”); *see also*, (Franz 167:5). Moreover, in 2021, an issue arose in matches where players were kicking balls at their opponents. This on-field issue resulted in instructions from Respondent to the Petitioned-For Officials as to how to PRO wanted the Petitioned-For Officials to handle those types of incidents in future matches. (Franz 167:11). Admitted exhibits establish PRO publishes detailed officiating instructions to the Petitioned-For Officials as illustrated in its “Some Positioning Thoughts” document. (PX-12).

g) PRO Controls Assessments and Evaluations.

The record shows PRO controls *assessments and evaluations* of the Petitioned-For Officials.

GM Webb testified “there are mid-year and end-of-year evaluations” by PRO2 Coaches of the Petitioned-For Officials. (Webb 70:17). Referee Franz and AR Felice confirmed the same. (Franz 176:4-6); (Felice 225:24-226:1). In addition, GM Webb explained that the PRO2 committee “meets twice a year” to review the Petitioned-For Officials’ performance. (Webb 71:12).

PRO Referee Coaches are designated by PRO to provide feedback to the Petitioned-For Officials. (Franz 175:2). Moreover, as explained by AR Felice, Respondent requires the Petitioned-For Officials to complete and submit self-evaluations for each match they work for PRO:

After each match, you watch the video of the match again. And we select moments where we performed well and other moments that are points for improvement. We use a system called TeamXStream to cut those clips out ... of the video. And then, we submit a survey with links to those video clips and written explanations for those moments to PRO.

(Felice 225:18-23); *see also*, (Franz 177:19-22 - “in addition to the other off-field requirements,

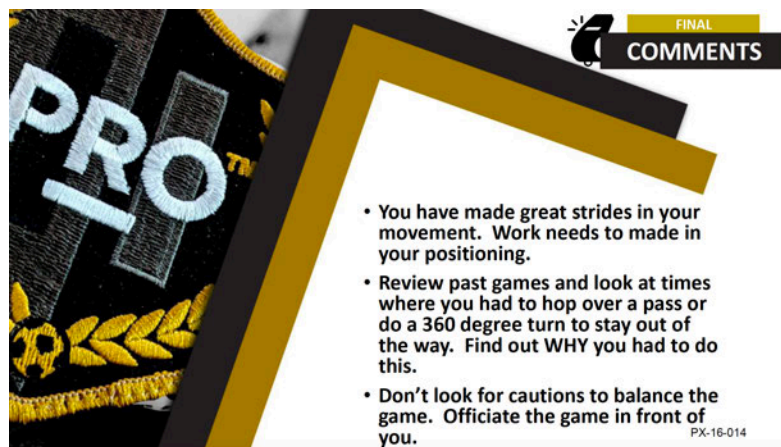
as PRO2 Tier C referee, I'm required to submit electronically details of a self-evaluation of my performances in matches that are assigned to me by PRO.”). Furthermore, for all NWSL matches, the Petitioned-For Officials receive written and verbal feedback from PRO staff or a designated referee assessor assigned by PRO. (Franz 181:18). In the 2021 season, Referee Franz also received verbal and written feedback on his performance for most USL matches he worked. (181:20). Similarly, PRO sends the Petitioned-For Officials written assessments of their performance following each match worked. (Felice 223:17).

Admitted exhibits establish PRO published a “professional development plan” which included season “goals” for Referee Franz. (PX-17); (Franz 179:7).



Such goals included “detection” and “compliance” metrics. (PX-17 at 003). PRO documented a midseason “evaluation” for Referee Franz (PX-18), and published an “end of year review” tailored to him. (PX-16); (Franz 177:11). PRO also published cumulative evaluations of Referee Franz and similar evaluations for AR Felice. (PX-19); (Franz 180:24); (PX-24); (PX-25); (PX-26). GM Webb confirmed these “comprehensive evaluations” of the Petitioned-For Officials at “mid-year” and “end-of-year” are “taken by [sic] the [C]oaches.” (Webb 70:17-21). For example, Referee Franz’s 2020 end of year review was presented to Franz via email and video conference with PRO management. (Franz 176:11). Both the 2019 and 2020 end of year reviews for Referee Franz

compiled detailed Officials' rankings and Franz's rank among his peers as well as pages dedicated to "Administrative Compliance." (PX-16); (PX-19). Referee Franz's 2020 End of Year Review concluded by giving him highly detailed advice from PRO on how to improve in the eyes of the Respondent:



(PX-16 at 014).

Separately, PRO completes a written per-match evaluation or "match assessment" of the Petitioned-For Officials. (Webb 119:8); (Felice 223:15). The admitted exhibits clearly show PRO's match Assessors analyzed no fewer than four main criteria with eighteen sub-criterion for Assistant Referees. (PX-24); (PX-25). Furthermore, "Key Match Incidents" ("KMIs") are given particular attention, where KMIs will "define the success of the performance." (Webb 50:9-22) (PX-24 at 003); (PX-25 at 003). Such KMI decisions made by a Petitioned-For Official during a match are cataloged by an Assessor down to the minute and second and ultimately marked as "correct" or "incorrect" by PRO management. (PX-24 at 003); (PX-25 at 003).

h) PRO Controls Employee Discipline.

The record shows PRO is in control of *employee discipline* of the Petitioned-For Officials.

GM Webb explained, in no uncertain terms, how PRO responds, in disciplinary fashion, if

a Petitioned-For Official “continually rejects assignments”:

[I]f an official ... continually rejects assignments week after week, they’ve probably got no place on the program. You know, they probably need to be doing something else. So we would have a word with them, and say, you know, why are you continually rejecting assignments. You know, do you -- are you serious about trying to progress at the top level or not.

(Webb 67: 4-11). Moreover, Respondent’s disciplinary authority over the Petitioned-For Officials is starkly illustrated by the documented demotion of AR Felice over an alleged travel expense policy violation. (PX-27); (Felice 228:4).

On June 8, 2021, AR Felice received an email from PRO2 Director of Match Officials, Alex Prus, in which Mr. Prus (following an “inquiry” from USL) questioned the number of nights AR Felice stayed in a hotel when working a USL match assigned by PRO. (Felice 228:1-6). AR Felice, following receipt of this email, was summoned to a disciplinary video conference with PRO2 managers Joe Fletcher and Alex Prus. (Felice 228:10-11). AR Felice complied and attended the disciplinary meeting by video conference on July 5, 2021, during which he was advised he was being demoted from a Tier A to a Tier B Assistant Referee:

Mr. Fletcher and Mr. Prus explained that my performance on the field throughout 2021 had been satisfactory. But because of this travel issue, I was being demoted from Tier A to Tier B.

(Felice 228:20-21). Thereafter, AR Felice was, in fact, “demoted” by PRO from Tier A to B. (Felice 228:20; 229:1). When advised of the demotion, only PRO staffers (and nobody from USL) were present on the video call with AR Felice. (Felice 247:8). AR Felice viewed his demotion as discipline by PRO. (Felice 230:14). This demotion resulted in AR Felice losing the opportunity for top-paying work assignments (specifically, MLS work assignments), loss of his PRO-supplied GPS watch for fitness monitoring, and lower-level education in monthly webinars with PRO staff. (Felice 229:22-230:14).

3) **PRO2 Officials are Engaged in a *Distinct Occupation*.**

The record shows that PRO2 Officials are engaged in a *distinct occupation*, that of soccer officiating for professional soccer matches. PRO2's mission was clearly articulated by GM Webb upon cross-examination:

Q: Okay. And PRO2's mission statement is, quote, to identify, train and develop future professional match officials and provide quality officiating in the leagues to which we assign. Is that also accurate?

A: That is. It's -- it's [sic] primary purpose is to provide future professional status officials, and while doing that at the same time is developing them is to provide a good service to those leagues that we are using as a vehicle to be able to do that, by assigning those officials.

(Webb 115:18-116:1).

In particular, PRO provides services for, and the Petitioned-For Officials work in, the top men's and women's divisions in the United States and the second and third men's divisions, or "minor leagues" in the United States. (Webb 24:9). This fact is undisputed and is illustrated on this record by the history of PRO2. Before PRO2, there was a "development group" formed by PRO in 2015. (Webb 31:11-32:13). That development group was rebranded as PRO2 in 2020. (Webb 32:14). PRO then created tiers A, B, C, and D in 2020. (Webb 33:5). Each tier has a distinct role in PRO2. (Webb 34:4-35:10).

4) **PRO Directs the Work of the Petitioned-For Officials.**

a) **PRO Controls Classification of the Petitioned-For Officials to the Respective Tiers.**

The record shows PRO controls *classification of the Petitioned-For Officials to the respective PRO2 Tiers*, and has published specific "Expectations and Opportunities" associated with each tier. (PX-2); (PX-20); (PX-37).

GM Webb testified PRO created tiers A, B, C, and D for PRO2 in 2020 after "rebranding"

the former development group. (Webb 33:5). Each tier has a distinct role within PRO2. (Webb 34:4-35:10; 96:13). There are presently 88 Officials in tiers A-C (Webb 36:10), and as GM Webb admitted, PRO2 decides which tier an official is classified. (Webb 97:3). Moreover, there is no dispute the PRO2 committee decides an Official's movement from one tier to the next or back down. (Webb 122:2); (Felice 227:10). Alex Prus, who reports to GM Webb, manages the promotion and demotion of the Petitioned-For Officials within the tiers. (Webb 97:16). One of the factors PRO considers in promotions and demotions within tiers is compliance with Respondent's required fitness program, as tracked by the data provided by the Petitioned-For Officials. (Franz 152:1).

Admitted exhibits establish PRO has published the names of the PRO2 Officials by tier (PX-1), as well as the expectations and opportunities for each tier. (PX-2); (PX-20); (PX-37); *see also*, (PX-48).

b) PRO Controls Assignment to Matches.

The record shows Respondent controls the *assignment of the Petitioned-For Officials to matches* for which they work. To this end, Respondent developed PROsphere, a website built by PRO to track match assignments, travel, and for other administrative matters, including COVID testing. (Felice 218:7-9). PRO requires the Petitioned-For Officials to inform PRO of their availability to work matches, including specific dates by which officials must submit requests for "blockout" dates. (Felice 218:14); *see also*, (PX-22 - "Please note that blockouts submitted after the deadline in red above will be left as 'Pending Approval' by our PRO2 coaches, and you will have to decline any assignments that you cannot hold onto as a result.").

GM Webb testified "the assignments [of the Petitioned-For Officials to matches] are made by the PRO2 committee, chaired by Alex Prus [of PRO] ..." (Webb 65:8). The Petitioned-For

Officials are notified of assignments by email through a “platform that [PRO] created”, *i.e.*, Prosphere. (Webb 66:24).

PROsphere <prosphere-update@prosphere.net>
Reply-To: nicole.ward@proreferees.com
To: [REDACTED]

You have a new game assignment for PRO. See Game Details below:

League: USL Championship
Game #: UC21387
Role: AR1
Fixture: Miami FC vs Loudoun United FC
Date: Sep 25, 2021
Start Time: 07:30 PM Eastern
Location: FIU Stadium (Miami, FL)

[Go to PROsphere to accept / decline / request travel.](#)

(PX-23); *see also*, (Felice 220:18-19 - “We receive an email through PROsphere notifying us we have a new game from PRO.”). AR Felice explained the process Petitioned-For Officials follow once Respondent has notified them of an assignment:

From the email we just saw, there’s a link at the bottom. I click on the link. It goes to a page in PROsphere for that specific game. And then, I’m able to accept the game, reject the game. And if I accept the game, I’m able to book travel at the same time. ...

[I]t [then] goes to another page where we fill out the dates of travel needed, the location we’re going, what modes of travel we need. And then ... if we are taking a flight, we put in a suggestion for which flight we would like to take. ... We take a screenshot of a flight we would like and then submit it to the [PRO] travel agent, who ultimately makes the decision.

(Felice 221:19-222:12). According to GM Webb, the Petitioned-For Officials are typically assigned matches by PRO 21-30 days prior to a match. (Webb 95:10-15). Until PRO has made the initial set of assignments to the Petitioned-For Officials, no other entity can. (Webb 95:20). Moreover, if a Petitioned-For Official declines an assignment, PRO2 will assign it to someone else. (Webb 95:5).

The record establishes the Petitioned-For Officials do not feel free to officiate any match without Respondent’s approval. (Franz 133:11). As testified to by Referee Franz, PRO expects Petitioned-For Officials to only officiate at matches it approves. (Franz 133:13). In addition,

Referee Franz explained he is not allowed to officiate any MLS match unless approved by PRO. (Franz 133:22). Moreover, Respondent has imposed a 72-hour scheduling restriction on the Petitioned-For Officials surrounding the time period of a PRO match assignment:

PRO has indicated that in the time period around an assignment that you would receive to work a league assigned by PRO, that we're not to work other matches for other assigners usually in the 48 hours in the lead up to that assignment or 24 hours afterwards.

(Franz 134:3-7). These scheduling restrictions result in the inability of Petitioned-For Officials to freely accept non-PRO work as soccer officials without Respondent's approval. Additionally, the Respondent utilizes the fitness data it requires from the Petitioned-For Officials to decide where to assign the officials in upcoming matches. (Franz 151:24:). The record also establishes that, beginning in 2015, Respondent instructed the Petitioned-For Officials that if they were contacted by an assigner for a league outside of those assigned by PRO, Respondent would coordinate their assignment. (Franz 133:4).

Admitted exhibits establish, conclusively, that PRO has amply documented its control over assignment of the Petitioned-For Officials to matches. *See*, (PX-22); (PX-23); (PX-45); (PX-46).

5) Skill is Required in the Petitioned-For Officials' Occupation.

There can simply be no dispute that significant skill is required in the Petitioned-For Officials' occupation. In fact, it is uncontested that the entire mission of PRO2 is to develop – through years of education, training, and experience – the skill of soccer officials for assignment to MLS games. Moreover, GM Webb agreed, in no uncertain terms, that the skills of the Petitioned-For Officials include, among other things, the ability to manage participants, teamwork, ability to recognize all play, and a knowledge of the rules. (Webb 102:7-11 - “Yep.”). PRO was formed for the purpose of administering a professional soccer referee program in the United States and to improve the quality of professional refereeing in North America through training [administered by

the program].” (Webb 115:17).

6) **PRO Provides Instrumentalities and Tools for the Petitioned-For Officials.**

a) **PRO Provides and Requires Uniforms for the Petitioned-For Officials.**

The record shows PRO provides and requires *uniforms* for the Petitioned-For Officials.

GM Webb admitted PRO provides a uniform to the Petitioned-For Officials when assigned to work MLS matches. (Webb 75:5); (Franz 141:7). PRO distributes these uniforms directly at preseason camp or sometimes by shipping. (Franz 141:11). PRO provides a “PRO2 badge” to all Petitioned-For Officials (Webb 76:14), which PRO “expect[s] them to wear...” (Webb 104:3); *see also*, (Franz 138:15); (Felice 208:1-5).



(PX-3). In addition, Respondent requires the Petitioned-For Officials to wear polo shirts when traveling to or from work for PRO in USL or NWSL matches. (Franz 138:3). When the Petitioned-For Officials are called upon by Respondent to work as video replay officials, PRO requires them to wear PRO-provided track suits and polo shirts. (Franz 140:21).

Admitted exhibits establish that PRO has documented the Petitioned-For Officials’ uniform and dress code requirements, including the requirement to wear the PRO2 badges. (PX-21); (Felice 209:3); *see also*, (PX-3 - a picture of the badge).

b) **PRO Provides and Requires Equipment for the Petitioned-For Officials.**

The record shows Respondent provides and requires certain *equipment* for the Petitioned-

For Officials to perform their PRO work.

The testimony of GM Webb demonstrates there is no dispute “[PRO] supplied communication equipment” to the Petitioned-For Officials for use in PRO-assigned matches. (Webb 77:24-78:13). Referee Franz and AR Felice both confirmed GM Webb’s testimony in this respect. (Franz 141:14-2:6); (Felice: 209:14-21). Moreover, PRO arranged and paid for a specialized ear-mold fitting process to facilitate the Petitioned-For Officials’ use of the on-field radio communication devices:

At a preseason camp, there was an audiologist who was designated who made a mold of the inside of our ear using some kind of putty, which then was sent off to a lab and turned into a hard plastic mold that fits to our ear on one side and connects to our communication devices on the other. ... PRO paid for the process. ... [And the] finished product was shipped directly to us.

(Franz 142:12-23). The specialty-molded communication device is not the only instrumentality provided by Respondent. PRO also supplies certain Petitioned-For Officials with a PRO watch, a Polar GPS, and heartrate monitor. (Felice 210:16-19); (Webb 79:10). As explained by AR Felice, PRO provided these devices at no cost to the officials so “that PRO’s sports science department could have a better understanding of our fitness and how we performed during training and matches.” (Felice 211:10-12). In addition, PRO provides the Petitioned-For Officials with all equipment necessary to perform work when assigned to video review. (Webb 104:14).

Admitted exhibits establish PRO has documented the provision of radio communication devices to PRO2 Officials. (PX-35).

7) PRO Has Long Employed the Petitioned-For Officials.

The testimony of GM Webb demonstrates there were Petitioned-For Officials in the PRO development group dating back to 2017 when General Manager Webb first started at PRO. (Webb 104:23). In addition, AR Felice, for example, started working for PRO before Manager Webb, in

2015. (Felice 203:18). And so did Referee Franz, who started in 2016. (Franz 131:7).

8) **PRO Pays Wages to the Petitioned-For Officials Directly for MLS matches and Indirectly for Other Matches.**

PRO *pays the Petitioned-For Officials directly* for all MLS matches they are assigned. (Webb 53:15); (Webb 53:25); (Webb 118:10). “We don’t [pay the Petitioned-For Officials] with the exception of if we use them as for officials or trial officials in [M]ajor [L]eague [S]occer.” (Webb 53:1). Whenever any Petitioned-For Official works an MLS match they submit invoices directly to PRO and get paid through ArbiterPay. (Webb 105:23); (Franz 161:1).² Moreover, for MLS matches worked, PRO provides the Petitioned-For Officials with an IRS form 1099 for taxation purposes. (Franz 161:6); *see also*, (Franz 161:19); (PX-36 - example of a 1099 sent by PRO to Referee Franz).

For matches worked in leagues other than MLS, PRO is involved with the payment structure for the Petitioned-For Officials. In fact, GM Webb testified, in no uncertain terms, that PRO is involved in setting the annual rates paid to the Petitioned-For Officials for work in NWSL and USL through meetings with the respective leagues wherein PRO “advocates” for rates of pay on behalf of PRO2 Officials. (Webb 59:3).

[PRO] advocate[s] for the best possible number ... for the league. We push the league [NWSL and USL] and say we think you should be paying this or whatever, understanding the time and effort that’s put into [the Petitioned-For Officials’] development. So we do advocate. ... there’s some negotiation.

(Webb 108:5-11). Moreover, PRO “set[s] the rate for the position [of the Petitioned-For Officials] on the game” (Webb 107:12), “regardless of who [it] assign[s]” to matches. (Webb 107:21).

² ArbiterPay is a third party payment processing application utilized by Respondent and the respective leagues to which it assigns to effectuate payment of wages to the Petitioned-For Officials.


When Petitioned-For Officials work USL or NWSL matches they complete an invoice form provided by PRO. (Franz 164:2). In 2014 and 2015, the Petitioned-For Officials' invoices related to NWSL were reimbursed directly by PRO; then in 2015 it switched to NWSL. (Franz 163:9). Currently, the Petitioned-For Officials are paid for NWSL and USL matches through ArbiterPay directly by the respective leagues. (Franz 157:11;159:2). However, if there is an issue with payment of match fees or expenses for any match, the Petitioned-For Officials are directed by Respondent to address the issue directly with a member of PRO's staff. (Franz 165:19); *see also*, (PX-10-002); (PX-11-002); (PX-30-002). The Petitioned-For Officials receive the same amount of pay per game (Franz 159:24) depending on the league for which PRO assigns them to work.

For NWSL in 2021:



	Position	2020 Fee	2021 Fee (4% Increase)
Regular Season	Referee	\$426.08	\$443.12
	AR	\$273.90	\$284.86
	4th	\$152.17	\$158.26
Other Playoff	Referee	\$669.54	\$696.32
	AR	\$401.72	\$417.79
	4th	\$267.82	\$278.53
	RAR	\$127.21	\$132.30
Finals	Referee	\$852.14	\$886.23
	AR	\$511.28	\$531.74
	4th	\$349.38	\$363.35
	RAR	\$127.21	\$132.30

For USL in 2021:

BU/PRO2-Rostered Officials (Tiers A-D)			Non-PRO2 Officials		
USL					
Championship	Position	2021 Fees	Championship	Position	2021 Fees
Regular Season	Referee	\$508.35	Regular Season	Referee	\$432.64
	AR	\$270.40	Regular Season	AR	\$216.32
	4th	\$162.24	Regular Season	4th	\$140.61
Playoff	Referee	\$757.12	Playoff	Referee	\$757.12
	AR	\$432.64	Playoff	AR	\$432.64
	4th	\$270.40	Playoff	4th	\$270.40
Finals	Referee	\$919.36	Finals	Referee	\$919.36
	AR	\$540.80	Finals	AR	\$540.80
	4th	\$367.74	Finals	4th	\$367.74
	RAR	\$216.32	Finals	RAR	\$216.32
USL 1					
League One	Position	2021 Fees	League One	Position	2021 Fees
Regular Season	Referee	\$378.56	Regular Season	Referee	\$324.48
	AR	\$194.69	Regular Season	AR	\$173.06
	4th	\$129.79	Regular Season	4th	\$108.16
Playoff	Referee	\$540.80	Playoff	Referee	\$540.80
	AR	\$292.03	Playoff	AR	\$252.03
	4th	\$194.69	Playoff	4th	\$154.69
Finals	Referee	\$648.96	Finals	Referee	\$648.96
	AR	\$378.56	Finals	AR	\$378.56
	4th	\$248.77	Finals	4th	\$248.77
	RAR	\$162.24	Finals	RAR	\$162.24

(PX-10 at 012); (PX-11 at 012). As explained by Referee Franz, a picture is worth a thousand words as it relates to Respondent's delineation between PRO2 and non-PRO2 USL rates:

Q. And Matt, are you aware whether PRO has input with respect to the amount of

compensation paid to you by the respective leagues that we saw in Petitioner's Exhibit 10, and now 11?

A. Yes. The ... discrepancy between the left column and the right column of this document, is that the left column contains the payment rates that were negotiated by Pro [sic] for named PRO2 [officials] in tiers A, B, C, and D in 2021 for those officials explicitly.

(Franz 160:2-9). Moreover, it is undisputed the Petitioned-For Officials do not receive the opportunity to negotiate the match fee rates unilaterally set by PRO. (Franz 182:12); (Felice 231:13; 232:9).

Examples of PRO invoice forms are PX-7, PX-8, PX-9, and PX-34. PRO has documented its instructions to the Petitioned-For Officials to submit fee and expense invoices through ArbiterPay. (PX-10-010); (PX-11-009). PRO has documented its instructions to Petitioned-For Officials to contact PRO staff regarding disputes over missing fee or expense reimbursements. (PX-10-002); (PX-11-002); (PX-30-002).

9) **The Petitioned-For Officials' Work is Part of PRO's Regular Business.**

The record demonstrates the Petitioned-For Officials' work is part of Respondent's *regular business*. In fact, there can be no reasonable dispute that the Petitioned-For Officials' work is not only a part of PRO's regular business – it is core to PRO's existence. As explained by GM Webb:

But the idea of the organization, as I said, was to create this vehicle for the professionalization of [soccer] officials. In other words, and officials would get paid to do the role of officiating, not just from -- from officiating the games, but beyond that, in the way that players receive salaries for being players on rosters without playing games. So PRO was set up with that intention.

(Webb 31:4-10); *see also*, (Webb 30:21-23 - "So when PRO was formed back in 2012/13, the organization was set, as was said earlier, to create a vehicle [for] the professionalization of officials.").

In addition, it is undisputed PRO2 is *not* a corporation or limited liability company unto

itself; rather, it is simply a division of PRO. (Webb 123:15).

10) The Petitioned-For Officials Believe a *Master-Servant Relationship* Exists While PRO Acts as if One Does.

It is undisputed the Petitioned-For Officials do no other tasks for PRO besides soccer officiating and soccer officiating related work. (Webb 116:14). Moreover, Referee Franz testified, in no uncertain terms, he is not free to officiate any match without PRO's approval. (Franz 133:11). Similarly, AR Felice explained how he was disciplined through tier demotion by Respondent (Felice 230:14), and that he considers Alex Prus, PRO2's Director, his "boss." (Felice 232:19). For this, and the litany of evidence discussed herein demonstrating PRO's control over their work lives, the Petitioned-For Officials rightfully believe a master-servant relationship exists between each Official and PRO.

11) PRO Is *in the Business* of Recruiting, Training, and Assigning Soccer Officials to Officiate Professional and Semi-Professional Matches.

The record aptly demonstrates PRO is *in the business* of recruiting, training, and assigning soccer officials to officiate professional and semi-professional matches, and that there is no dispute about this. PRO was formed for the purpose of administering a professional soccer referee program in the United States and to improve the quality of professional refereeing in North America. (Webb 115:17). PRO is funded annually by Major League Soccer, US Soccer, and the NWSL. (Webb 25:23; 109:20-110:4). PRO provides no other services except those related to soccer officiating. (Webb 115:17). PRO's mission statement is to identify, train, and develop future professional match officials and provide quality officiating in the leagues PRO assigns. (Webb 115:22).

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IV. CONTROLLING LAW.

With respect to the controlling law in the instant petition, there are two salient issues: (1) the controlling case on whether the Petitioned-For Officials are statutory employees under Section 2(3) of the Act; and (2) the application, or not, of Section 2(3) because, according to Respondent, the Petitioned-For Officials are “unpaid” by the Employer.

1) **The Controlling Board Case Law to Determine Statutory Employee Status under Section 2(3) is *SuperShuttle*.**

In determining statutory employee status as required by Section 2(3) of the Act, the Regional Director must apply current NLRB case law. The prior precedent was *FedEx Home Delivery*, which applied the common-law test to determine employee status and “more clearly define[d] the analytical significance of a putative independent contractor’s entrepreneurial opportunity for gain or loss.” *SuperShuttle DFW, Inc.* 367 NLRB 75 (2019) (“*SuperShuttle*”), citing *FedEx Home Delivery*, 361 NLRB 610 (2014) (“*FedEx*”), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017) (“*FedEx II*”). The Board’s *SuperShuttle* decision overruled *FedEx* as pertaining to entrepreneurial opportunity, and emphasized entrepreneurial opportunity *as part* of the common-law agency test. *Id.* However, the common-law agency test remains and the Employer still maintains the burden to prove independent contractor status. *Id.*

The common-law test is a multi-factor, fact-intensive analysis from the Restatement (Second) of Agency §220 where no one factor is dispositive. *Id.* The “total factual content is assessed.” *Id.* The ten factors are:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without

supervision.

- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (f) The length of time for which the person is employed.
- (g) The method of payment, whether by the time or by the job.
- (h) Whether or not the work is part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relation of master and servant.
- (j) Whether the principal is or is not in business.

Id. The focus on entrepreneurial opportunity comes from the qualitative aspects of each of the various factors.

“[E]ntrepreneurial opportunity is not an individual factor in the test; rather, entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors. Generally, common-law factors, which support a worker’s entrepreneurial opportunity indicate independent-contractor status; while factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case.”

Id.

Next, *SuperShuttle* points to other relevant case law for the industry concerned. *PIAA* and *Big East* represent Board opinions specific to the sports officiating industry. *PA Interscholastic Athletic Association*, 365 NLRB 107 (2017) (“*PIAA*”), *enf. denied* 926 F.3d 837 (D.C. Cir. 2019) (“*Interscholastic*”); *Big East Conf.*, 282 NLRB 335 (1986) (“*Big East*”). It is important to note the Board agreed with the Regional Director in *PIAA* that *Big East* was not controlling on *PIAA*

because *Big East* predated *FedEx*, and even *Roadway Package System*³. *PIAA*, 365 NLRB 107. Notably, what *was* recognized by the Board in *PIAA* was that there continues to be no categorical pronouncement by the Board that sports officials are independent contractors. *Id.*

What is left then for controlling industry-relevant law is *PIAA*, the case of high school lacrosse referees from Pennsylvania for whom the Regional Director and Board ordered a representation election. The Regional Director relied on the common-law test as it was interpreted at the time – using *FedEx* (without the emphasis on entrepreneurial opportunity). *Id.*

Subsequently, the D.C. Circuit Court of Appeals declined enforcement of the Board’s decision in *PIAA* for two reasons. First, the D.C. Circuit cited the “few times which PIAA actually pays Officials,” referring to the frequency of payment and the seventh factor in the common-law test. *Pa. Interscholastic Ath. Ass’n v. NLRB*, 926 F.3d 837, 840 (D.C. Cir. 2019) (“*Interscholastic*”). Second, the D.C. Circuit, in reference to the sixth factor, pointed to the relative short length of the high school lacrosse officiating season, which was four months. *Id.* at 841.

It is important to recognize that the common-law test was not rejected by the D.C. Circuit, but rather it was the fact-based analysis of two of the ten factors that the court analyzed and weighed heavily in deciding not to enforce the Board’s decision. However, this discussion becomes academic, because as case law holds, the Regional Director and Board are not bound in the instant petition by the D.C. Circuit’s decision to not enforce the Board’s ruling in *Interscholastic*. Therefore, the Regional Director and Board are obliged to follow Board precedent until such time as either the United States Supreme Court or the Board itself overturns the

³ *Roadway Package System*, decided in 1998, represented a major shift in independent contractor law under the Act. *Roadway Package System*, 326 NLRB 842 (1998); see *PIAA*, 365 NLRB 107 (2017).

precedent. *See, e.g. Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1998); *Beverly Health and Rehabilitation Services Inc.*, 332 NLRB 347, 356, fn. 21 (2000); *Painters Local Union No. 64*, 273 NLRB 13, 17 (1984).

Accordingly, the controlling case law in the instant petition is the common-law test under *SuperShuttle* and the relevant sports officiating industry opinion of *PIAA*.

2) **Assuming, Arguendo, the Region Determines the Petitioned-For Officials Lack an Economic Relationship with Respondent, the Region Must Still Undertake a Fact-Based Analysis of the Relationship Between the Petitioned-For Officials and PRO.**

The Employer points to *NLRB v. Town & Country Elec. Inc.* (“*Town & Country*”) and the Black’s Law Dictionary definition for “employee,” relying on the notion that if a person is paid by another entity, she cannot be an employee. *See* Rider at 2 (citing 516 U.S. 85 (1995)). Respondent attempts to over simplify the relevant analysis to one as simple as *only they who sign the paycheck can ever be the employer*. Board precedent flatly rejects this idea, and leaves the Regional Director with existing case law with which to guide the analysis – which, here, is the common-law test and *SuperShuttle*.

The Board, in interpreting *Town & Country* stated, “The result is that the Board and the courts have been left with the task of defining [employee] in ways that are consistent with the legislative purpose of the Act,” and “[it is primarily the Board’s task to apply its labor relations expertise in interpreting Section 2(3) in a manner that comports with the general policies and purposes of the Act.” *Toering Elec. Co.*, 351 N.L.R.B. 225, 227, 2007 (citing *Town & Country* at 88-90; *Sure-Tan v. NLRB*, 467 U.S. 883, 891-892 (1984)). Additionally, and quite importantly, the Board has interpreted *Town & Country* as the Supreme Court’s “approval of the Board’s broad reading of the definition.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). *WBAI Pacifica Foundation*, 328 N.L.R.B. 1273, 1273 (1999).

The Respondent attempts to proceed one step further with its misguided position when it argues the Petitioned-For Officials have no economic relationship to the employer, either actual or anticipated, and therefore, cannot be statutory employees. *See* Rider at 2, citing *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999). Moreover, Respondent attempts to disenfranchise the Petitioned-For Officials even further when it argues they cannot even be independent contractors and that the common-law agency test for employee versus independent contractor is not applicable. *See* Rider at 3. Yet, despite being belied by the evidence in this matter, the Employer’s position would place the Petitioned-For Officials in a proverbial “no-man’s land” with respect to the Act where no test can be applied. This is certainly not a result envisioned by the NLRA.

From a factual standpoint, Respondent’s lack of economic relationship argument falls flat. The record in this matter establishes PRO pays the Petitioned-For Officials directly when they are assigned and work MLS matches. In addition, GM Webb repeatedly testified as to how PRO “advocates” with both NWSL and USL on an annual basis to set payment rates for the Petitioned-For Officials’ work in those leagues. Moreover, GM Webb admitted NWSL provides annual six-figure funding to PRO, which is “less than a quarter of a million [dollars].” (Webb 110:1-4). Mr. Webb provided conflicting testimony as to whether USL also provides annual funding to PRO. GM Webb once stated “the USL pay nothing” (Webb 109:16), but also testified that “the USL *do pay* a small – a quite small modest amount, but a small amount towards some of the training costs.” (Webb 109:14-16) (emphasis added). While the record demonstrates the NWSL and USL currently pay the Petitioned-For Officials directly for matches worked in those leagues, testimony establishes Respondent previously paid the Petitioned-For Officials directly for their NWSL work. (Franz 163:9-12 - “In 2014 and 2015, our expenses for NWSL and match fees were paid directly by PRO after the invoice [was sent] directly to PRO.”). And, there was no dispute that PRO directs

and expects the Petitioned-For Officials to deal with Respondent directly if any issues arise regarding discrepancies in match fees or expenses paid by either NWSL or USL. The record in this matter militates in favor of rejecting, in whole, Respondent's lack of economic relationship argument.

However, even assuming, *arguendo*, the Respondent's "we don't pay them" economic relationship argument had merit, the Board still must conduct a thorough fact-based analysis, looking to the totality of the relationship as it did between *WBAI* and its unpaid staff. In fact, in the closing paragraph of its *WBAI* opinion, the Board proffered that, "[t]hese *circumstances* show that the relationship between the Employer and unpaid staff is not that of employer and employees contemplated by the Act. Unpaid staff do not depend upon the Employer, even in part for their livelihood or for the improvement of their economic standards." *WBAI Pacifica Foundation* 328 NLRB at 1276 (emphasis added). As the record aptly demonstrates in this matter, the Petitioned-For Officials depend heavily upon PRO for their livelihood and improvement of economic standards.

Therefore, the Region may appropriately analyze the instant petition by use of the common-law agency test as interpreted by the Board in *SuperShuttle* and the industry precedent set by *PIAA*.

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V. ARGUMENT.

1) The Petitioned-For Officials are Statutory Employees of PRO.

Section 2(3) of the Act, as amended by Congress in 1947, contains a broad definition of “employee” that excludes “any individual having the status of independent contractor.” 29 U.S.C. § 152(3). In *NLRB v. United Ins. Co.*, the Supreme Court held that the “obvious purpose” of the independent-contractor exception was to have the Board and the courts apply “general agency principles” in distinguishing between the two types of workers. 390 U.S. 254, 256 (1968). The Supreme Court has endorsed the non-exhaustive list of factors contained in the Restatement (Second) of Agency, and has emphasized that under the common-law test “there is no shorthand formula” – instead, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.* at 258; *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 & n.31 (1989). In addition, the Board has considered “entrepreneurial opportunity” and related considerations as an additional relevant factor. *SuperShuttle DFW, Inc.* 367 NLRB 75 (2019). In accordance with *United Insurance*, the Board has recognized for several decades that the common-law test requires a “careful examination of all factors,” and that no particular factor is categorically “more or less indicative of employee status” in every case. *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998). The party alleging independent-contractor status, which strips workers of all rights under federal labor law, has the burden of proof in establishing that claim. *E.g., BKN, Inc.*, 333 NLRB 143, 144 (2001). In general and in order to avoid unnecessarily denying workers their statutory rights, the Board must exercise “particular caution” before concluding that workers fall into one of the exceptions to employee status contained in the Act. *See Beverly Enters.-Mass., Inc.*, 165 F.3d 960, 963 (D.C. Circuit 1999). Here, PRO is the party seeking to strip these professional soccer officials of their rights under federal labor law, and

therefore has the burden of proving the independent contractor exception to employee status. However, Respondent failed to carry that burden. Each factor below is addressed in detail within the factual section of this brief, but a summary review of each again demonstrates the Petitioned-For Officials are statutory employees.

First, regarding the Extent of Control by Employer factor: As in *PIAA*, PRO determines the qualifications, sets training standards, manages the selection process, and controls performance evaluations for the Petitioned-For Officials. And, again as in *PIAA*, while the Petitioned-For Officials are not directly supervised while officiating matches on the field, there are mechanisms in place whereby they are held accountable to PRO for their on-field performance, including post-match reporting, performance assessments, required self-evaluations, post-match webinars, and mid- and end-of-season performance reviews. In contrast, the respective leagues are wholly disconnected from this process.

Second, regarding the Whether the Individual is Engaged in a Distinct Occupation or Business factor: As in *PIAA*, the Petitioned-For Officials perform their functions in furtherance of PRO's core purpose – so much so that PRO could not operate without them.

Third, regarding the Work Performed Under the Direction of the Employer factor: PRO oversees compliance with prescribed rules and regulations and effectively enforces this compliance by determining the Petitioned-For Officials' eligibility for future job opportunities.

Fourth, regarding the Skill Required in the Occupation factor: In *PIAA*, the Board found that, notwithstanding the officials' level of skill, the mandatory certification and training requirements imposed on them undermined any argument that these skills could be sold "on the open market." This is precisely what the evidence shows with respect to the Petitioned-For Officials in this matter.

Fifth, regarding the Provision of Instrumentalities, Tools, and Place of Work factor: the evidence demonstrates PRO provides the Petitioned-For Officials with uniforms for certain matches while mandating they wear a PRO2 badge for all matches officiated in USL or NWSL. In addition, the Petitioned-For Officials are required to wear PRO polo shirts when traveling to and from match assignments and there are similar requirements when assigned video replay work by PRO. Moreover, Respondent provides certain Petitioned-For Officials with a PRO watch, a Polar GPS, and heartrate monitor to ensure compliance with its physical fitness requirements. Finally, PRO provides the Petitioned-For Officials with radio communication devices (inclusive of professionally crafted ear molds) to be worn while officiating PRO-assigned matches.

Sixth, regarding the Length of Time Employed factor: PRO's involvement with the Petitioned-For Officials is intended as part of an ongoing training and promotion program designed to advance the officials into higher levels of officiating. In fact, some of the Petitioned-For Officials have been working with PRO's development group (now referred to as PRO2) since its inception in 2015.

Seventh, regarding the Method of Payment factor: In *PIAA*, the Board found that although the putative employer – PIAA – did not make direct regular season payments to the officials, the association controlled the compensation process. That is the case here too. When the Petitioned-For Officials work matches for PRO in MLS, payment is processed and paid directly to those Officials by PRO on a regular basis. And, when the Petitioned-For Officials work matches for PRO in either USL or NWSL, payment is made directly by those respective leagues. But in either case, PRO exercises substantial control over the amount of compensation and process by which the Petitioned-For Officials are compensated by those leagues, including accepting annual funding from those leagues and advocating yearly for the rates paid to the Petitioned-For Officials.

Moreover, if a Petitioned-For Official has an issue with payment of fees or expenses following a PRO-assigned match in USL or NWSL, it is PRO the Official contacts to resolve the issue and not the respective Leagues.

Eighth, regarding the Whether the Work is Part of the Regular Business of the Employer factor: There is no dispute PRO is in the business of training, developing, and assigning soccer officials to professional and semi-professional soccer matches. This factor should be undisputed.

Ninth, regarding Whether the Parties Believe they are Creating Relation of Master and Servant: Obviously, the filing of the current petition indicates the Petitioned-For Officials and Petitioner both view these officials as employees of PRO. In addition, PRO has the authority to and, in fact, disciplines the Petitioned-For Officials as well as control nearly every aspect of their professional soccer officiating lives.

The tenth and final common law factor, regarding the Whether the Principal is or is not in Business factor: This factor is not in dispute as PRO is an active business with its base of operations in New York City.

Finally, as to “Entrepreneurial Opportunity”: This analysis also militates in favor of finding employee status. The Petitioned-For Officials have no opportunity to complete their officiating work in a shorter time period thereby opening up entrepreneurial opportunity. The timing of soccer matches are strictly controlled, the timings of the webinars are set by PRO, and PRO even dictates the timing by which Petitioned-For Officials must arrive and when they can depart the venue city of the assigned match. In addition, the Petitioned-For Officials must receive PRO’s approval prior to accepting officiating work not assigned by PRO. And, even assuming approval is granted, PRO has created a 72-hour restrictive bubble around each match assignment whereby the Petitioned-For Officials may not perform other officiating work. Moreover, PRO controls assignment to the

highest level soccer leagues in the United States, which greatly limits the Petitioned-For Officials opportunities to apply their craft at the highest levels of their profession.

As is evident from the evidence and the argument set forth herein and applying the time-tested “duck test” referenced in the Summary, the Petitioned-For Officials walk, whistle, and look like statutory employees.

2) The Appropriate Unit Excludes Tier D Officials, as Stipulated.

The record easily establishes the appropriate unit consists of PRO2 Tiers A, B, and C soccer officials, and excludes those officials in Tier D because they do not share a community of interest.

First, there is no dispute Tier D is considered by both Respondent and Petitioner as the “training tier.” (Webb 38:16).

Second, the record shows how the officials in Tier D differ significantly from Tiers A, B, and C:

- Tier D officials have no dedicated PRO Coach as do the other three Tiers. (Manikowski 253:1).
- Tier D officials do not attend monthly educational training webinars as do the other three Tiers. (Manikowski 253:16); (PX-2); (PX-20).
- Tier D officials are not required to do self-evaluations unlike the other tiers. (Manikowski 253:23); (PX-2); (PX-20).
- Tier D officials are not issued equipment unlike the other tiers. (Manikowski 253:4).
- Tier D officials do not attend preseason camps held by PRO unlike the other tiers. (Manikowski 253:12).
- Tier D ranks are not as stable as the ranks of the other tiers. (Manikowski 254:20-25).
- Tier D officials are not required to wear badges like the other tiers are. (Manikowski 254:24-255:5). If fact, they are prohibited from wearing the PRO-II badges. (PX-21).
- Employer expectations are notably less for Tier D than the other Tiers, as

documented in PRO publications. (PX-2); (PX-20); (PX-37).

Third, the employer stipulated in the hearing that Tiers A, B, and C (excluding Tier D) would be the appropriate unit (if found to be statutory employees). (Tr. 258:14).

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VI. CONCLUSION.

Based on the evidence adduced in the investigatory hearing on this record, and the applicable law, the Region should conclude the Petitioned-For Officials in tiers A, B, and C are statutory employees of PRO and, based on all other stipulated issues in the hearing, deny the motion to dismiss the petition, and proceed to order a direction of election to vindicate the purposes of the Act.

Respectfully submitted on:

Date: September 30, 2021



By: _____

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of New York that a copy of the foregoing document,

PETITIONER'S CLOSING BRIEF

with any of its attachments, was personally e-filed on the NLRB's website, and served by email, on the date indicated below to:

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Dated: September 30, 2021

A handwritten signature in black ink, appearing to read "L. K. Middlebrook", is written above a horizontal line.

Lucas K. Middlebrook, Esq.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**PROFESSIONAL REFEREE
ORGANIZATION, INC.,**

Employer,

and

**PROFESSIONAL SOCCER REFEREES
ASSOCIATION,**

Petitioner

Case No. 02-RC-281723

POST-HEARING BRIEF OF PROFESSIONAL REFEREE ORGANIZATION, INC.

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PROFESSIONAL REFEREE ORGANIZATION, INC.'S POST-HEARING BRIEF

Professional Referee Organization, Inc. (“PRO” or “Company”) submits this brief pursuant to Section 102.66(h) of the Rules and Regulations of the National Labor Relations Board (“Board”). Based upon the record evidence, it is indisputable that the individuals sought to be represented by the Petitioner in this case are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* (“Act”) For the reasons set forth below, the Company submits that the Petition should be dismissed.

I. FACTS

A. The Petition

On August 20, 2021, the Professional Soccer Referees Association (“Petitioner” or “Union” or “PSRA”) filed a Petition¹ for the following unit:

Included: Soccer Officials designated by the employer, PRO, as Tiers A, B, and C Officials.²

Excluded: Soccer Officials designated by the employer, PRO, as Tier D.

B. The Hearing

The Hearing in this matter was held via Zoom videoconference on September 15 and 16, 2021, before Hearing Officer Joseph Luhrs.

¹ Board Exhibit 1(c). Hereafter “Bd. Exh.” refers to exhibits introduced by the Hearing Officer; “Tr.” refers to the page citation of the official transcript; “P. Exh.” refers to exhibits introduced by the Petitioner.

² The number of individuals listed as present on the petition is 88. Tr. 261; Bd. Exhs. 2(a)-d).

C. Nature of the Company's Business

The Company was founded in 2012 by Major League Soccer (“MLS”) and the United States Soccer Federation (“USSF” or “U.S. Soccer”) –and jointly funded by these organizations—to improve the levels of performance and realize the benefits of advancing soccer officials to professional status. Tr. 25. PRO directly employs, trains and develops professional soccer referees, assistant referees and video assistant referees. The term “professional soccer officials” refers to MLS level officials, which are also called senior match officials. Tr. 23. For purposes of PRO, only senior match officials have an opportunity to earn a living officiating.³

PRO is a Delaware Company that is located at 420 5th Avenue in Manhattan. The organization rents space from Major League Soccer. Tr. 23. PRO’s purpose is to employ numerous match officials who are assigned to referee primarily in Major League Soccer. The job of PRO is to train and support the officials, advocate for them, and provide support services that are required at the highest level of the game. Tr. 24.

PRO is run by its General Manager, Howard Webb. Tr. 19. Mr. Webb is a former professional referee with 11 years of experience officiating with the English Premier League, and has officiated games for FIFA and UEFA. He also worked as a Director of Officiating in Saudi Arabia and as a television analyst. He retired from active officiating in 2014. Mr. Webb was

³ Both developmental officials who testified in this proceeding asserted they earned their “living” as “professional” soccer officials. These are overstatements designed to shade the record in favor of Petitioner. Tr. 121, 202. Mr. Franz admitted he actually earns his living as a full-time software engineer for Lockheed Martin, a position which requires him to work at least 2080 hours per year. (Tr. 183-184). Moreover, Mr. Franz only worked 8 assignments for matches in 2020. P. Exh. 16, p. 2. Mr Felice too, has another primary means of incomes as a freelance media person. Tr. 202.

also part of the senior management team for the English equivalent of PRO, called the Professional Game Match Officials Limited (“PGMOL”). Tr. 20.

As General Manager, Mr. Webb is responsible for overseeing the activities of PRO. Tr. 21.

Nick Primavera is PRO’s Chief Operating Officer. Tr. 21 There are four directors who assist with management of PRO. Mark Geiger is the Director of Senior Match Officials, and has responsibility for officials who are members of the bargaining unit and work primarily in Major League Soccer—about 95 officials-- employed directly by PRO. The bargaining unit officials are employed to work at the highest level of the game domestically in the United States. Tr. 21-22.

Alex Prus is the Director of PRO2, the development rung of PRO. Mr. Prus oversees the coaches and is responsible for developing officials who are aspiring to make it into the senior match official group managed by Mr. Geiger. Tr. 23.

Tom Beckvermit is PRO’s Director of Sports Science. Mr. Beckmervit’s role concerns physical preparation and performance of match officials. He works with a team of sports scientists and is responsible for ensuring the individuals employed by or being developed by PRO maintain physical fitness standards. Tr. 22. Sandra Serafini is Director of Strategic Initiatives and Innovation. Ms. Serafini maintains the various platforms operated by PRO, and more recently, COVID-19 issues. Tr. 22-23. *See* P. Exh. 29.

D. Professional Soccer in the United States

Professional soccer worldwide is administered by the Zurich, Switzerland based FIFA. Approximately 211 countries belong to FIFA, including the United States. Tr. 20.

U.S. Soccer—also known as the United States Soccer Federation-- is the Chicago-based FIFA member organization governing soccer in the United States. Tr. 26. U.S. Soccer certifies

national referees and assistant referees, sets the fitness standards and sets the Laws of the Game (“LOTG”)—the rules and standards for competition-- for players and referees.⁴

Major League Soccer – or MLS--is the only Division I men’s soccer league in the United States. Tr. 24. MLS consists of 27 teams and is looking forward to an expansion to 28 in the next year. Tr. 24. PRO directly employs the professional soccer referees who officiate MLS matches. These professional officials are represented for purposes of collective bargaining by Petitioner. There is in existence a collective bargaining agreement, which by its terms is effective January 16, 2019 to January 15, 2024 (“CBA”). Jt. Exh. 2. Article II of the Agreement sets forth the scope of the bargaining unit to include only those professional officials.

There are four categories of professional officials: Referee--the official in the middle of the field blowing the whistle. There are 25 such referees employed by PRO. Assistant Referees are the officials who work on the side of the field with flags assisting the referee. There are 48 professional assistant referees employed by PRO. There are 11 Video Assistant Referees, known as VARs, who work at the stadium in a video operation room identifying situations where the on field referees missed a serious incident. Tr. 27, 29. Finally, there are 11 Assistant Video Assistant Referees, known as AVARs, and these individuals assist in the video review booth. Tr. 27-28, 29. VARs and AVARs generally cannot work on the field as referees or assistant referees unless they are doing so on a trial basis. Tr. 28. The 95 bargaining unit officials are directly employed by PRO and receive a salary and benefits. Tr. 29; Jt. 2.

⁴ LOTG are uniform in the United States. [Laws of the Game \(ussoccer.com\)](https://www.ussoccer.com/laws-of-the-game), last accessed on September 30, 2021. LOTG are ratified each year by FIFA.

E. Core Competencies of Officials Are Set by U.S. Soccer Which Requires Annual Certification.

U.S. Soccer has a refereeing structure consisting of 5 different levels. These include grassroots, regional, national, professional, and international. To get through these levels an official needs to be evaluated by competent—non-PRO-- evaluators, and also must officiate at least 50 matches. When an official passes the competencies, they can be considered for the next step. The assessments are conducted by licensed assessors and licensed instructors around the country. Internationally, the officials are evaluated by internationally certified instructors. Tr. 42.

In order to officiate at a higher level in the United States, an individual must receive national certification from U.S. Soccer, including the individuals who are the subject of the Petition. Tr. 188, 233. An official who wants to be certified must fill out paperwork, pay a fee and pass an annual fitness test. Tr. 188-89, 234. The officials PSRA seeks to represent this matter, are individually responsible for maintaining national certification, including filling out all necessary paperwork and paying the fees to U.S. Soccer. Tr. 188-89, 234,

F. Soccer Leagues

There are a number of other leagues relevant to the issue in this case:

National Women's Soccer League ("NWSL") is the Division I women's professional soccer league. NWSL currently has 9 teams. Tr. 24-25. The regular season runs from late Spring to Fall with four matches played each week, while one team sits out. Tr. 63.

United Soccer League ("USL") is a Tampa, Florida based commercial enterprise that operates Division II and Division III men's leagues. Clubs can buy into the leagues. USL Championship League is DII. USL League 1 is DIII. Tr. 26, The USL Championship has 31 teams and USL League 1 has 12 teams. Tr. 61. While designated a professional league, the

players do not advance to the level of MLS. Tr. 27. The season for USL is late Spring to Fall and involves a post-season. Tr. 64.

G. PRO2 and Development of Highly Skilled Referees and Assistant Referees

PRO2 is the development arm of PRO.

The idea of PRO was to create a vehicle for the professionalization of officials where referees would get paid to officiate, not just on a match-by-match basis but on a salary basis. This is similar to players being on rosters of a professional team and receiving a salary even if they do not play in a game. Tr. 31.

In 2015, approximately three years after PRO was created, the management team realized there needed to be a pipeline into professional officiating because officials generally retire when they reach a certain age. Tr. 31. PRO set up a development group, in discussion with U.S. Soccer, and took responsibility for assigning certain games that previously would have been assigned by other assigners. Tr. 31. The idea was—and is—to give officials in the group the best opportunity to develop, to become prospects for employment further down the line. Tr. 31.

The development group utilized games in USL—and NASL, a men's DII professional league which no longer exists-- to assign officials.

The development group was rebranded in 2020 as PRO2. Tr. 32. The rebranding occurred because Mr. Webb and others felt that was a better representation of the organization, and for the PRO2 officials themselves, in order to give them the best opportunity to reach Division I.

PRO2 is a not a separate entity, but a department within PRO. PRO2's mission is to identify, recruit and train soccer officials to reach the highest level of the game, which is MLS officiating, and beyond that, international officiating.

PRO2 includes a committee that is chaired by Mr. Prus (Tr. 42), and the other committee members include:

- Erich Simmons – A coach assigned to work with a number of officials within PRO2 Tr. 42.
- Mark Kadlecik –A coach assigned to work with a number of officials within PRO2 Tr. 42.
- Rick Eddy – a representative of U.S. Soccer Tr. 45.
- John Westbrooks, a member of PRO's Sports Science department– responsible for individual fitness plans and wellness checks. Tr. 42, 47.

In addition to the committee, PRO2 has on staff Amy Edwards, a video analyst who provides access to video post-game so officials can evaluate their own performance. Tr. 42.

Along with the rebranding of the name, PRO also changed the tiers and created Tier A, B, C and D. Tr. 33. The prior development initiative placed officials in Tiers which were named Elite, Elite Development and Premier. Tr. 34; P. Exh. 1. When Mr. Webb became General Manager, he changed the names of the tiers to A, B, C, and D because the prior names did not make a lot of sense in his opinion. Tr. 34. The tiers reflect the skill level of the soccer officials as determined by PRO2.

Tier A – consists of referees and assistant referees who are close to being able to officiate MLS games full-time. Tr. 34. When a Tier A official advances, they could be hired directly by PRO and become part of the bargaining unit covered by the Agreement. The skill level descends thereafter from B to C. Tier B officials have to be part of the program for a period of time and have shown some ability and aptitude. Tr. 37. Tier C is not quite entry level. It's the first level

where you get some coaching support. Tr. 38. Tier D consists of the entry level, including individuals who are prospects but are not being actively developed. Tr.38.

Tier A, B, and C officials are given an opportunity to continue receiving important experience, to receive feedback on their officiating and to develop their skills by officiating USL and NWSL games. Qualification for Tiers A and B is contingent upon completion of the Men's FIFA fitness test. P. Exh. 37. The guidance and coaching increases with the tiers. The feedback, development and coaching are very similar to what can be found anywhere in the country. For example, state soccer associations organize webinars and other developmental opportunities for officials. Tr. 40. PRO simply puts together the "best opportunity" to develop. Tr. 40.

PRO2 coaches—those who are assigned to evaluate the officials in Tiers A-D, must have had FIFA or professional level officiating experience. P. Exh. 49.

1. Soccer Officials Are Invited to Take Part in PRO2

Individuals who demonstrate talent and higher aspiration are invited to participate in the PRO2 program. There is no application process to become a PRO2 official, and PRO2 officials sign no agreement with PRO. Tr. 68-69, 238. They are in the program because they were invited and want to be there. As Tom Felice—a current Tier B Assistant Referee in PRO2 testified—his first contact with PRO2 was when he received an assignment. Tr. 204, 206. The PRO2 officials often have full-time jobs outside of soccer. For example, Matthew Franz—a Tier C referee—is a full-time software engineer for Lockheed Martin. Similarly, Mr. Felice is a freelance media person. Tr. 23. PRO2 officials want to hone their skills. They are volunteers who understand the relationship with PRO: they receive free developmental support, evaluation, and the opportunity to move up to MLS; in exchange, they have homework and other developmental duties to assist with their development.

2. Assignment of Tier A, B, and C Officials

Historically, PRO manages 100% of assignments to NWSL games and about 80% of USL games. Tr. 60. During the pandemic as a temporary measure, PRO assigns all USL games to maintain uniformity of the league's health policies. Tr. 61-62. However, during non-COVID years, for those USL games not assigned by PRO, the staffing is farmed out to national assigners who draw from the list of nationally certified soccer officials. It is possible for a national assigner—who is not affiliated with PRO—to assign a Tier A, B, or C PRO2 official to a USL match. When this occurs, the assigner and official will inform PRO as a courtesy but there is no requirement that they do so. Tr. 62.

PRO2 does not bar officials from working for any other leagues not assigned by PRO. Tr. 61-62. There are a number of professional soccer leagues in the United States that PRO has no involvement with on any level.⁵ Tr. 32.

During the pandemic, all sports institutions developed COVID policies to enable play to continue and the NWSL and USL are no different. The leagues pay for COVID tests. Tr. 60. PRO2 may have communicated these policies to the officials as part of its assignment responsibilities but they are still league policies. See, P. Exhs. 10, 11, 47.

Tier A, B, and C officials are free to accept or reject an assignment. Tr. 66. If an official rejects too many assignments, PRO2 may drop them from the program for lack of commitment. Tr. 67. Assignments occur thirty days in advance. Tr. 95. The soccer officials are allowed to block out their schedule to identify dates on which they are not available. Tr. 191. When they do receive an assignment, they are asked electronically to accept or reject the assignment in

⁵ NISA is a professional soccer league which is assigned by U.S. Soccer directly with no involvement of PRO. Tr. 33.

ProSphere-- the PRO digital platform used for scheduling. If the official accepts the assignment, they are taken to a separate web page where their travel is booked. Tr. 67.

3. Tier A, B, and C Officials Do Not Receive Any Compensation or Traditional Benefits for Participation in the Program

PRO does not pay any PRO2 officials for their development efforts nor does PRO offer any benefits to PRO2 officials. Tr. 59. The only exception is if PRO assigns certain officials on a trial basis for Major League Soccer matches. Tr. 53. The Collective Bargaining Agreement allows PRO to assign non-bargaining unit people to MLS games. Jt. Exh. 2.

A majority of the matches officiated by Tier A-C officials are for the NWSL and USL. PRO pays nothing to officials for NWSL and USL matches it assigns. Tr. 58. PRO2 officials receive a fixed fee for each USL and NWSL match they officiate. These fees are paid by USL and NWSL for games officiated in those leagues. Tr. 56, 58. The flat match fees are set by the USL and NWSL. Tr. 57-8. While PRO may advocate for increases in match fees, the final decisions are made by the leagues. Tr. 59. There is no distinction in match fees among Tiers A, B, C or D. Tr. 243; P. Exh. 10, p. 11 (match fees for NWSL) and P. Exh. 11, p. 10. While Petitioner will argue the PRO2 officials are forced to accept these fees because they did not “negotiate” for them, Mr. Felice admitted that he has never negotiated for any fee of a match he officiated at the amateur and professional level. Tr. 246.

PRO2 officials can make themselves available to take assignments as they see fit. Tr. 64. PRO2 officials do not have to be available every week of a league season and may block out dates on which they are unavailable. Tr. 64-65; P. Exhs. 22 and 45. PRO2 officials can block out days in bulk for months in which they are unavailable. P. Exh. 45, p. 4. An official also is free to turn down an assignment. *See* P. Exh. 23 (example of electronic notification of assignment where the official is free to accept or decline). *See also*, P. Exh. 46.

Assignments are made by the PRO2 committee several weeks in advance to accommodate schedules and to book the best cost of travel. PRO2 looks at whether there are historical difficulties between a head coach and an official. The committee looks at a range of factors starting with whether the official is available. Tr. 66.

Travel policies are maintained by the leagues. Tr. 241; Tr. P. Exhs. 5 (USL Travel Policy) and 6 (NWSL) policy. Although these policies are communicated by PRO2 to the officials, the leagues monitor and determine compliance. Indeed, Mr. Felice was notified by email that USL had raised an issue with a non-compliant invoice he had submitted to the league. Tr. 228; P. Exh. 27.

When a match is complete, the official electronically invoices USL or NWSL for the match fee and any reimbursable out of pocket travel related expenses. Tr. 106, 164, 239; P. Exh. 34 (USL1 invoice which states “Submit monthly invoice to referees@uslsoccer.com for all USL-1 assignments”). The league will then pay the official through an electronic system called ArbiterPay. Tr. 239. At the end of the year, the official receives an IRS Form 1099 from the league. Tr. 239.

Occasionally, PRO2 officials –mostly from Tier A—will be asked to be an on field official at MLS games to provide a training opportunity to the official. Tr. 53. Officials in Tier B and C occasionally may be asked to be the fourth official at an MLS match – the official who is not on field--and is stationed between the two coaches to manage things like player substitutions and clocks. Tr. 54. In such cases, PRO will pay the MLS match fee and will issue a 1099 to the PRO2 official which specifically notes it is for “non-employee compensation.” *See* 161; P. Exh. 36 (Non-employee compensation IRS Form 1099 for PRO2 official).

4. PRO2 Officials are Responsible for Purchasing Uniforms and Equipment

PRO does not purchase any equipment for PRO2 officials to keep. While PRO may give out polo shirts and tracksuits to be worn by PRO2 officials before and after the game, PRO does not purchase any actual uniform or equipment needed for the officiating services provided to the leagues.

PRO2 officials are responsible for purchasing 100% of on field attire for NWSL and USL assigned matches. Tr.75, 190, 207. These officials use these uniforms whether they are assigned by PRO2 or a national assigner. It is also possible these officials are officiating matches that have no affiliation with NWSL or USL. PRO2 officials may have several uniforms depending on the league, all of which they are responsible for purchasing. The PRO2 officials will generally purchase uniform items from a company called Official Sports International. Tr. 207.

PRO2 officials also purchase their own shoes appropriate for the surface of the game and whistles (for referees) and flags (for assistant referees). Tr.77, 239.

PRO2 officials deduct the amounts paid for uniforms and equipment as business expenses on their tax returns. Tr. 190, 240.

PRO2 does provide a patch for officials to wear on their uniforms, although the officials are not given any instructions about wearing the badge. Tr.76, 208. The patch is Velcro so it can be taken off if the official is not officiating a PRO2 assigned match. The patch is the PRO insignia with a faint Roman numeral "II" in the background. P. Exh. 3. Tier A, B, and C but not D officials may wear the patch. There is no requirement that the Tier A-C officials wear the badge; they could wear a U.S. Soccer badge if they wanted. Tr. 104. It is a symbol to the leagues that the "officials with PRO2 badges represent the strongest officials within our program." Tr. 76. Only Tier D officials may not wear the patch and PRO wishes to maintain transparency when they "step onto the pitch." Tr. 76,208-9; P. Exh. 21.

In contrast, the MLS bargaining unit officials are given uniforms by PRO which are made by a vendor named Capelli. Tr. 76. When a PRO2 official is assigned to officiate an MLS game, PRO provides the uniform because it is not readily available to the public. Tr. 75. When officiating in the MLS, the patches are sewn onto the uniform. Tr. 187.

Tier A officials are loaned GPS watches which monitor heart rate during play. Tr. 240-241. The Tier A official uploads the data on their computer. Tr. 79, 241. The watch is PRO property and must be returned by the official if the person leaves Tier A for any reason. Tr. 241. Mr. Webb noted the watches are an important development tool to monitor heart rate of the official during the match. Tr. 79. Officials are responsible for providing their own timepieces to keep track of the match time. Tr. 79.

At the beginning of every season, PRO issues communications devices to about 90 percent of PRO2 center referees which contain four walkie talkie units to be used during the match. Tr. 78, 209, 240. PRO pays for all PRO2 officials to receive a customized ear mold to use with the communications gear. Tr. 209-10. The communications gear is returned by the referee to PRO at the end of every season. Tr. 79; P. Exh. 35

5. PRO2 Officials Must Maintain a Certain Level of Physical Fitness the Standards of Which are Set by FIFA

The fitness standards for all officials are set by FIFA and U.S. Soccer. Tr. 41. Regardless of affiliation with PRO2, soccer officials who are certified by U.S. Soccer have to maintain a level of fitness commensurate with the level of soccer they are officiating. Tr. 235. As Tier C official Mr. Franz testified “FIFA outlines the fitness testing, procedure, and requirements....” Tr. 188. All U.S. Soccer certified national referees and assistant referees- of which PRO2 officials are but a very small subset-- must pass a FIFA test at least once a year. Tr. 188, 234. The PRO2 officials pay for that certification themselves. Tr. 189, 234. PRO offers

an opportunity to pass the FIFA test during a preseason development retreat each year which is testing at FIFA standards. Tr. 41. This is the same test that must be taken and passed by officials in other countries. Tr. 48. If an official does not pass the test, they cannot be assigned games. Tr. 49. As Mr. Franz put it, “fitness is enforced by the assigners of the league.” Tr. 188. Similarly, if an official does not pass the FIFA fitness test they are removed from PRO2. Tr. 50

To be a soccer official at the highest level, the person must be in a peak physical condition. As part of development within its development program, PRO2 assists with planning fitness so officials are able to progress up the tiers toward reaching the MLS level. No official who aspires to reach the highest level would shirk this responsibility. Individualized fitness programs are offered. These individualized training programs are completely voluntary. Tr. 47. The officials are not mandated to be in the program. Tr. 47.

PRO2 maintains increased scrutiny of physical fitness depending on the official’s Tier level. P. Exhs 2 and 4. Mr. Webb testified Tier A-C officials provide morning wellness scores—how they feel. They also are asked to provide post-training feedback to Mr. Westbrook, the Sports Science person. Tr. 47. This is because PRO2 is assigning a number of games on behalf of U.S. Soccer and it wants a better understanding of the type of game to which the official should be assigned rather than drawing names randomly. Tr. 47. Mr. Felice acknowledged that all the fitness requirements are to assist PRO2 officials with their development.⁶ Tr. 235. This is to ensure the greatest level of success in advancing to MLS and

⁶ Mr. Felice testified that the morning wellness checks and post-workout surveys are not developmental, in his opinion. Tr. 235. This is an attempt to shade testimony to make it sound as if there are “requirements” officials have to follow that are not developmental. Wellness checks assist PRO2 with determining the fitness and fatigue levels of an official so that PRO2 can help the individual. Tr. 47. The evaluations of the development officials make this clear. P. Exh. 19, p. 9 (“One of the requirements of all Development Group Officials is to complete a daily

the bargaining unit. The official must want to commit to the program and PRO2's fitness guidelines simply give a regular program to ensure the official is given support. The monitoring of physical fitness and advice given by PRO2 Sports Science experts is rendered free of charge.

6. PRO2 Officials Are Evaluated On Their Performance and Development Using FIFA and League Standards

The standards used to evaluate performance are set by FIFA and the leagues, not by PRO. NWLS officials are assessed by a U.S. Soccer National Referee Coach. Tr. 42. For the various levels of officiating recognized by U.S. Soccer, that organization assesses and determines whether the official can move up a tier. Tr. 42. PRO does not have its own standards. As Mr. Webb explained, the "fundamentals" of the game are the same and "the laws of the game, which are created by the International Football Association Board, are contained in a book or online document [which applies to] all officials...around the world." Tr. 121.

Just as with the physical fitness regimen, feedback PRO2 gives to officials in the program is commensurate with the individual's Tier. *See e.g.*, Tr. 206-207, P. Exh. 20. PRO2 has made clear the metrics used to evaluate bargaining unit officials are used for PRO2 officials to determine to which tier the official should be placed. These metrics evaluate on performance which is ultimately governed by the LOTG:

While the GP metrics of the Assessment forms in PROsphere serve as an employment status evaluation tool for BU members, PRO2 requires metrical analysis at a more granular level. With four tiers comprising the PRO2 roster (A-D), plus prospective talent to consider inviting into the PRO2 program, a need was identified to further break down officiating performances to better evaluate which officials belong in which tier.

P. Ex. 31, p. 2 (Emphasis supplied).

wellness questionnaire to assist PRO's Sports Science team assess fitness and fatigue levels. Completion of these questionnaires is mandatory.")

The breakdown of the metrics for development of an official was as follows. A successful official “must be proficient in four major ‘buckets,’” identified as Physical (Stamina, Explosiveness, Active Zones, Positioning), Technical (Misconduct Recognition, Foul Recognition, Match Control, Game Management, Laws Knowledge, Crew Teamwork), Psychological (Participant Interaction, Anticipation, Composure, Focus), and Professional (Match Difficulty, Professionalism, Coachability). P. Ex. 31, p. 2. All witnesses who testified, corroborated this fact: the feedback uniformly has to do with how they are doing *while officiating* during a league game according to the LOTG. Tr. 50, 70, 176, 237. Petitioner’s Exhibit 16 – the 2020 year-end review for Mr. Franz—talks only about on-field performance.⁷ The end of year evaluation provides a recommendation as to whether the official should be moved within the tiers, promoted to the bargaining unit, or demoted out of the program. See, P. Exh. 26.

Officials are also evaluated on Key Match Incidents or KMIs, which are situations in the game that has a strong bearing on the outcome of the game. Tr. 49; P. Exh. 16. A red card situation where the player gets sent off is an example. Tr. 49. As Mr. Webb said, the biggest failure of all officials at all levels in terms of KMIs is to under punish. That is, not handing out a red card when one is due, or not awarding a penalty kick when one should be awarded. Mr. Webb pointed out this is an issue across the world, where the intensity of on-field accuracy for red cards sits at around 60 percent. Tr. 51. In other words, evaluation of the Tier A-C officials—contrary to anything Petitioner may assert—really has to do only with the LOTG, the league standards. PRO2 develops none of these standards.

⁷ This document also references administrative compliance—whether the official submitted wellness checks and attended webinars. Both of these administrative tasks are developmental.

The league handbooks distributed to PRO2 officials make clear that the leagues set the ground rules for what happens on the field, which in turn is governed by the LOTG. While Petitioner’s witnesses cast it as “requirements” of PRO2—or how PRO was telling them to handle a situation-- the record demonstrates that the requirements are all developmental in nature, akin to homework. For example, Matthew Franz—a Tier C referee in PRO2-- cast the feedback and guidance for on field positioning as PRO in nature. However, the document Franz cited to—“2021 Season—Some Positioning Thoughts”—refutes his testimony completely. This document demonstrates that PRO2’s focus is teaching the officials how to best officiate according to the LOTG. P. Exh. 12. There is no reference in the document to any *PRO2 rules* on positioning, but only the accepted LOTG positioning. The LOTG are cited to and quoted extensively throughout the materials. This is an example of how the developmental nature of PRO2 is focused singularly on the game and teaching the officials how to better position themselves on field.

7. The Leagues Require Additional Tasks Which Are Facilitated By PRO

Petitioner claims there are many requirements imposed by PRO2, which is simply not true. Aside from the developmental issues like fitness and feedback regarding on-field performance, there are league requirements, which although facilitated by PRO, are required of all officials regardless of affiliation with PRO2.

League Match Reports. The leagues, not PRO, require the officials complete match reports, which are simple electronic forms indicating the score of the match and whether there were any significant events, such as discipline. Tr. 81-2; See P. Exhs. 12, 14, 38, 40, and 43. Match reports are then uploaded into Box, where the league “will have access to the folder and will be able to download reports for their records.” *Id.* If a significant on-field event occurs, the official may be required to file a supplemental report providing additional information. P. Exhs.

15, 40. While Petitioner may claim that these are PRO requirements, they are not. The mere fact that PRO provides a platform for the official to upload the document does not make it a work requirement of PRO. As Mr. Webb explained, there is some sensitivity to having officials share their contact details with clubs, so uploading these files to a file sharing site makes good sense. Tr. 82.

League Checklists. The leagues, not PRO, require match officials to complete a checklist which is a basic form indicating that the official has completed duties associated with the match. P. Exhs. 39 (NWSL checklist which states “Please upload completed Referee Checklist into Box under 2021 NWSLForms to Upload and within the proper Week’s folder). See also, P. Exh. 41. The checklist “must be uploaded into Box under the respective league’s Forms to Upload (USLC/USL1) and within Week’s folder, along with Match Report, Supplemental Report, Sub Passes.” P. Exh. 41.

All these electronic forms are very simple and require minimal description of the event and other information so the leagues can evaluate what occurred. The match reports and league checklists are not limited to PRO. While PRO2 requests to see a supplemental report before it is submitted to the league, it is to evaluate the manner in which such reports are being completed not whether it must be submitted.

If a student does not do the homework, they likely will not progress to the next level. Being a PRO2 official is no different. Tom Felice, an Assistant Referee who aspires to make it to MLS, testified that PRO2 offers webinars, some of which are voluntary for Assistant Referees, but he attends anyway to learn as much as he can. While Petitioner will cast Mr. Felice’s demotion from Tier A to B earlier this year as some kind of evidence of employment-like status, the circumstances are nothing of the sort. Mr. Felice acknowledged that he did not follow the

travel policy of the USL when he submitted an expense report for two nights of stay in a Tampa, Florida hotel, when only one night was authorized. Tr. 242. The demotion in ranking was because Mr. Felice did not follow the league rules. Tr. 228. While Mr. Felice likely will not be receiving assignments to the MLS for the remainder of the season, he still receives the same match fees for USL and NWSL that he received when he was in Tier A. Tr. 242.

PRO2 officials receive formal bi-annual feedback on their development, once mid-season and then again at the end of the year. These evaluations rank the officials' performance in league matches. See P. Exh. 16 (Mr. Franz' rank as an official in NWSL, USL and USL1 matches). The evaluations focus on officiating and fitness, measuring things such as "Key Match Incidents" ("KMIs") which are significant mistakes—incorrect calls—which could result in a goal for the opposing team or a player being mistakenly left on or sent off the field. PRO2 may also create a development plan for the official, which exclusively focuses on on-field conduct and fitness. See, P. Exh. 17. The educational purpose of the development plan is made clear to the PRO2 Officials:

As part of individual development plans, there are 2 distinct requirements for ongoing education that require 100% involvement from the match official: Firstly, the submission of a self-evaluation document to their coach for every PRO game the official undertakes, and secondly, 100% attendance at Monthly Development Group Clip Webinars.

P. Exh 18, p. 4 (Emphasis supplied). See also, P. Exh. 19, p. 8.

It is based on these evaluations that PRO2 may promote or demote an official within the tiers. Approximately 4 or 5 individuals may move up to the Bargaining Unit at the end of this year. Tr. 73. A similar number will likely move out of the program from the bottom tier to allow new prospects to gain an opportunity for development. Tr. 73. Mr. Webb estimates the turnover in the group is approximately 20% each year. Tr.74. Mr. Webb acknowledged that in

the last year with COVID, it was unfair to remove people from the program because there were not sufficient opportunities. Tr. 74.

H. Tier D Officials Have Minimal Contact With PRO2

As noted throughout the record, the primary focus of PRO2 is Tiers A-C. There exists a Tier D, but these officials have only a tenuous contact with the organization. They are officials who have been identified as showing promise but have not yet been truly invited into PRO2. *See* P. Exh. 48, which demonstrates Tier D officials have no coaching or regular point of contact with PRO2.

II. ARGUMENT

BOARD LAW COMPELS THE DISMISSAL OF THE PETITION AS NONE OF THE TIER A, B, OR C⁸ OFFICIALS ARE STATUTORY EMPLOYEES

It is clear from the evidence in this case that PRO2 officials are not employees within the meaning of the Act. There is nothing in the way of the typical hallmarks of employee trappings such that the Tier A, B, and Officials employees can be considered employees of PRO. Tier A, B, and C employees do not apply to become part of PRO2, do not enter into any agreements with PRO, and are free to accept or reject assignments as their schedules and work obligations with their full-time careers permit. Separate and apart from PRO2, all officials must maintain national certification from U.S. Soccer in order to be assigned to any professional soccer league. PRO2 officials can work non-PRO assigned matches. PRO2 officials do not render any services to PRO2. While the officials receive match fees for officiating soccer games, these fees—which are identical for Tier A-D officials-- are for services rendered to the leagues.

⁸The Tier A-C officials are definitely not statutory employees. Tier D officials have even less contact with PRO2 and therefore cannot be employees.

A. PRO2 Officials Do Not Fit Within the Act’s Definition of Employee

Section 2(3) of the Act defines the term “employee” as including:

. . .any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. §152(3). This provision contains a number of exceptions, including “independent contractor.” It is clear, as discussed below, that PRO2 officials are—if anything—independent contractors. However, the essential question is whether they are independent contractors of PRO—from whom they receive no compensation—or the leagues.

Not surprisingly, “soccer officials” are not specifically mentioned as an exclusion. Over the years, the Board has struggled with determining how certain positions fit within the statutory framework of statutory employees. There has been very little consensus over individuals who are primarily graduate students at universities and colleges, but who receive some compensation for services they render to the institution.⁹ See, e.g., *Columbia University*, 364 NLRB No. 90 (2016) (holding, 3-1, that graduate student teaching assistants are employees); *Brown University*, 342 NLRB 483 (2004) (divided ruling holding that student teaching assistants are not

⁹ PRO is aware of the General Counsel’s GC 21-08, dated September 29, 2021 concerning the current position of the agency on statutory employee status of athletes who play at academic institutions. This memorandum merely states the General Counsel’s position and is not a definitive interpretation. This position concerns services by athletes rendered to their university or college. PRO2 officials do not render services to PRO. The memorandum illustrates a problem of definition in this area of the law. A particular individual may be a statutory employee one day only to have that status revoked.

employees); *New York University*, 332 NLRB 1205 (2000) (decision holding that teaching assistants are statutory employees). PRO2 officials have some passing similarity to the graduate students discussed in these cases, but their relationship with PRO is significantly different—and more tenuous-- such that they cannot be deemed statutory employees. The graduate students were all paid by the universities for services rendered to the institution, such as grading papers, and running sections. PRO2 officials are not paid for *any service* rendered to PRO. The only economic benefit a PRO2 official receives is a match fee and that is for a services rendered to USL, NWSL or—for a subset of PRO2 officials-- MLS.

U.S. Supreme Court and Board decisions routinely hold that that a common sense construction of the term employee is an exchange of services for compensation. In *NLRB v. Town & Country Electric*, 516 U.S. 85, 90 (1995), the Supreme Court held that union salts who were also working for and paid by the employer were statutory employees because even though their purpose was at odds with the employer, the salts still performed work for the employer in exchange for compensation. The Court used the dictionary definition of employee, which includes compensation:

The ordinary dictionary definition of “employee” includes any ‘person *who works for another in return for financial or other compensation.*’ American Heritage Dictionary 604 (3d ed. 1992). See also Black’s Law Dictionary 525 (6th ed. 1990) (an employee is a ‘person *in the service of another* under any contract of hire, express or implied, oral or written where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed’).

(Emphasis added).

Looking at the issue from another angle, the Board has held that individuals who are not paid for services they may have rendered to the employer are not employees. *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999). *WBAI* is instructive here because it was a unit clarification

decision where a union sought to include unpaid staff into an existing bargaining unit. The Petitioner here seeks a separate unit for Tier A-C officials but the arguments are very similar. The Regional Director found the unpaid staff to be employees because they received some compensation in the form of travel reimbursement and child care allowance and when they were paid for substituting for absent paid staff members. *Id.* The Board disagreed, noting that in each case “where the [Supreme] Court found statutory employee status, there was at least a rudimentary economic relationship, actual or anticipated between the employee and employer.” *Id.* at 1273. The Board cited the common sense definition of “employee” in *Town and Country*. The Board then went further and provided the dictionary terms for “hire” – “To purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation” and “Compensation” “Remuneration for services rendered, whether in salary, fees or commissions.” *Id.* The Board concluded that “when the Court stressed the breadth of Section 2(3) in *Town and Country Electric*, that breadth was bounded by the presence of some form of economic relationship between the employer and the individual held to have statutory employee status.” *Id.* The Board found it significant that the unpaid staff members testified that they did not work for “hire” in the ordinary sense of the word. Rather, these individuals’ worked for the employer out of personal motivation. *Id.* at 1275.

Applying these principals here, there is no rudimentary economic relationship between PRO and the Tier A-C officials. The officials participate not as hires but as volunteers who are given an opportunity to improve their skills. Mr. Felice acknowledged he was selected for the program and did not apply. All remuneration—match fees and travel expenses – is paid by the leagues. There are occasionally officials who are paid by PRO for officiating in MLS matches, but this is limited for the most part to Tier A and some Tier B officials. These officials are paid

the established match fee. The Board in *WBAI* rejected any notion that because unpaid staff “are paid when they substitute for paid staff is also not evidence that they receive compensation for their work at the station.” *Id.* at 1275.

PRO2 officials clearly do not render services to PRO. Mr. Felice acknowledged that everything he does in PRO2—with the exception of daily wellness checks and post-match surveys—is for his development as an assistant referee. Tr. 234-6. Mr. Felice aspires to make it to the highest level of officiating, which in the United States is officiating for MLS games. Tr. 236. In order to hone his skills, Mr. Felice and other PRO2 officials volunteer to be evaluated on their enforcement of the LOTG and to maintain a level of fitness required to officiate. Mr. Felice willingly attends non-mandatory webinars in order to continue his development and reach his goal. Tr. 237. There is no “service” rendered to PRO by any PRO2 official; the services are for the benefit of the officials.

While Petitioner will cast fitness regimens, referee checklists, match reports, supplemental match reports and COVID testing as “requirements” of the “job,” this misses the point. Every one of these tasks are conducted by all officials in every FIFA affiliated league for every match. More important, all of the requirements are set by FIFA or U.S. Soccer or the leagues, not by PRO.

The developmental metrics PRO2 uses to evaluate officials are wholly developmental and used differently than for bargaining unit employees. PRO2 clearly has stated that the metrics used for employment status of bargaining unit members must be used in a more granular fashion to evaluate PRO2 officials and determine their proper ranking. P. Exh. 31. But all metrics have to do with an official’s on field performance and nothing to do with PRO2’s requirements. The four major buckets of proficiency for a successful official—physical, technical, psychological

and professional are unquestioningly related to officiating. None of these tasks constitute a service rendered to PRO.

PRO2 does not compensate its PRO2 officials. The graduate students in *Columbia University*, *Brown University* and *New York University* all received money from the academic institutions they attended for services they rendered to the institutions—and even these duties have caused debate as to whether the individuals are statutory employees. The PRO2 officials—all tiers A, B, C, and D-- receive the same exact match fees regardless of tier from the leagues. Tr. 242; P. Exhs. 10 and 11. There is no agreement between PRO and the leagues as to compensation. If a PRO2 Tier A official works in MLS they receive the match fee for that match. While Petitioner undoubtedly will highlight the fact PRO pays the match fee for MLS games, this too is not evidence of payment for a service rendered to PRO because such payment is for service rendered to MLS. The match fees are for services rendered to each league.

B. PRO2 Officials Would Be Exempted As Independent Contractors

Petitioner has cited *PA Interscholastic Athletic Association*, 365 NLRB No. 107 (2017) (“*PIAA*”), *enf. denied* 923 F.3d 837 (D.C. Cir. 2019) as support for its contention that PRO2 officials must be employees of PRO. *See* Rider to Petitioner’s Responsive Statement of Position, p. 2-3. The application of *PIAA* to this case is fundamentally wrong for very simple reasons. First, contrary to Petitioner’s assertion, PRO2 officials do not have to be employees of any entity; rather, like in this case, they can be volunteers who wish to hone their skills with support of PRO. Sometimes an individual is not a statutory employee. Second, and more important, the officials in *PIAA* were beholden to the employer which established and maintained the gateway to officiating lacrosse at 1611 member schools. In denying enforcement, the D.C. Circuit noted that the independent contractor analysis—which is largely reliant on factors of agency taken from the Restatement (Second) of Agency—does not involve any special administrative

expertise requiring special credence by a reviewing court. 923 F.3d at 840. While Petitioner notes the Board does not accept circuit court decisions as precedent, that ignores an important fact: this case could likely end up in the D.C. Circuit.

As the Board noted in its decision, PIAA is an organization “whose primary purpose is to promote uniformity of standards in the interscholastic athletic competitions...of its 1611 member schools in Pennsylvania.” 365 NLRB No. 107, Slip op. 1. PIAA determines the method and qualifications for the registration of officials. PIAA officials pay a registration fee to the organization, must pass a background check conducted by the organization and pass a test. *Id.*, Slip op. 1-2. PIAA develops and applies the necessary policies, procedures, rules and regulations for such officials. *Id.*, Slip op. 1. PIAA rules state that fees are a matter to be negotiated between the individual official and the individual school. *Id.*, Slip op. 2.

PIAA is distinguishable on every point to this case. PRO2 officials are not certified by PRO or PRO2, but by U.S. Soccer, which sets all standards, including the fitness levels. The standards the PRO2 officials must meet are developed by FIFA, and mainly consist of the LOTG. The match fees, checklists and other game requirements are set by the leagues, not by PRO. PRO2 officials merely agree to participate in a program to better enhance skills set by other organizations.

In any event, applying the independent contractor test from *FedEx Home Delivery*, 361 NLRB No. 55 (2014), enf. denied 849 1123 (D.C. Cir. 2017)¹⁰ set forth by the Board in *PIAA*

¹⁰ The *FedEx* test, like the graduate student case law hardly shows a consensus in Board law and the agency should tread carefully before creating a new definition of “employee” triggering the protections and obligations of the Act. The framers of the Act simply did not contemplate including unpaid volunteers who are in a program of their own volition as statutory employees. PRO believes *FedEx* does not adequately consider the statutory underpinnings of employee status under the Act or other federal and state laws interpreting independent contractor status and should be overruled.

shows the PRO2 officials cannot be employees because at best they are independent contractors of the leagues. These officials have an even more tenuous, less defined relationship with PRO2.

1. PRO Has Very Little Control Over PRO2 Officials

The officials in *PIAA* worked for an organization the constitution of which determined “the method of and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary policies, procedures, rules and regulations for such officials.” *PIAA*, 365 NLRB No. 107, Slip op. 3. The Board determined this factor weighed in favor of employee status because PIAA “exerts much more control over the manner of officials’ work, including specific rules for calling lacrosse games and ethics rules, and maintaining authority to enforce those rules against officials.” *Id.*, Slip op. 5.

PRO2 does not create any policies, procedures, rules or regulations for its officials, all of which are developed by the leagues, U.S. Soccer, and FIFA. PRO2 does not determine the method of qualification for national soccer officials, which is developed and maintained by U.S. Soccer. The officials who testified in this proceeding maintain their own national certification—which they held before becoming PRO2 officials-- which is separate and apart from PRO2. While PRO2 sets mandatory webinars and fitness programs within the tiers, these are entirely developmental and educational. The attendance at classes and the requirement of homework was not considered part of the equation in the graduate student cases. To the extent PRO requires mandatory attendance, it is more for the individual to show commitment to the program than anything else. If a graduate student doesn’t attend class often or fails to do homework, the end result is a parting of company between the student and the organization. PRO2 officials can drop out of the program and still be nationally certified officials with the ability to officiate soccer matches, including for the USL.

2. The PRO2 Officials Are Not Engaged In a Distinct Occupation or Business

The Board in *PIAA* found the officials perform their functions in furtherance of the employer's operations, "so much so that PIAA would not be able to function without them." *Id.*, Slip op. at p. 5. This is hardly surprising given that PIAA controlled the gateway—and membership requirements- for referees officiating matches at its 1611 member schools.

In contrast, PRO2 assigns 100% of games only for NWSL matches of which there are 4 per week during a season. USL1, USL Championship and other leagues are not exclusively assigned by PRO. There is a network of national assigners who schedule officials for matches. The fact the PRO2 officials have a national certification administered by U.S. Soccer means they have access to college and other matches with a variety of leagues to officiate, separate and apart from their affiliation with PRO2.

3. The work is not done under the direction of PRO2

The Board in *PIAA* found this factor to weigh in favor of employee status because:

PIAA tightly controls the work that officials perform through mandatory adherence to rules, regulations, policies, and procedures. From the outset, PIAA certifies the officials by administering an examination of the officiating rules, it maintains the rule book that officials apply, and it requires officials to attend ongoing chapter meeting and training sessions.

Id., Slip op. 5.

Officiating games in NWSL and USL by PRO2 officials is not done pursuant to adherence to rules, regulations, policies and procedures of *PRO*. The officiating is conducted by the individual pursuant to the LOTG. PRO2 simply provides feedback—using the LOTG—as guidelines.

4. Skills of PRO2 Officials Are Obtained Prior to Affiliation With PRO

The Board in *PIAA* found it “significant that PIAA itself certifies the officials and requires them to receive ongoing PIAA training to remain eligible. This in-house certification and training further undermines the impression that the officials are selling their skills on the open market.” *Id.*, Slip op. 6.

Again, PRO2 does not certify the officials. All national soccer officials—not just those in PRO2—must maintain certification with U.S. Soccer to officiate matches. PRO2 does not maintain mandatory in-house training which is required to maintain certification; rather, the mandatory sessions for Tier A-C officials who volunteer to participate in the program are educational and developmental and focused on officiating. A PRO2 official can leave the program at any time and still be certified with U.S. Soccer and still officiate games. An official with such certification can accept assignments to officiate matches even without PRO2.

5. PRO Does Not Provide the Tools Needed to Officiate

The Board found that the fact PIAA officials have to supply their own uniforms and equipment, such as whistles, pencils, uniforms, hats, penalty markers argued in favor of independent status but did not find it “particularly weighty.” *Id.*, Slip op. p. 5. The Board did not explain why it gave so little weight to this factor, which points to an issue with whether the analysis set forth in *FedEx* is useful generally when no indication as to what might make the this factor more significant.

In this case, the PRO2 officials must supply their own shoes, uniforms, penalty flags and other equipment. PRO provides watches for Tier A officials, but this is for health monitoring. While center referees are issued communications equipment by PRO2 for use when officiating, it must be returned at the end of the season.

6. Officials Are Not Employed For Any Length of Time

The Board in *PIAA* found this factor “inconclusive” because the employer registers the officials annually and is dependent on payment of annual dues and meeting performance standards set by PIAA. *Id.*, Slip Op. 7. The Board noted that the fact officials of PIAA continue to officiate for a number of years “suggest[s] an expectation that officials will work for PIAA over a number of years.” *Id.* In denying enforcement, the D.C. Circuit Court of Appeals criticized the Board’s diminution of this factor:

The Board erroneously discounted this short duration of the officials’ employment because ‘PIAA registers officials annually,’ encourages re-registration, and ‘many officials work for PIAA for many years.’ *PIAA*, 365 N.L.R.B No. 107, at 8. But unlike a worker who is automatically invited back year after year and, if available, assigned hours, PIAA officials must satisfy various criteria to re-register and there is no guarantee that registered officials will be selected to referee any games in any given year. *See In re Lancaster Symphony Orchestra*, 357 N.L.R.B. 1761, 1761 (2011).

923 F.3d at 841.

By contrast, PRO2 officials are farther removed than the lacrosse officials in *PIAA*. PRO2 officials have no expectation of continued “employment” or continuation in the PRO2 program. Continuation within the program is dependent on the individual complying with external certification requirements first and foremost. If a PRO2 official does not pass the annual FIFA fitness test, or otherwise successfully register with U.S. Soccer in any given year by not completing the paperwork or paying the fees, they will not continue in PRO2. More important, continuation in the program is contingent on the advancement in skills. Several officials are dropped from the program each year. In addition, there is no guarantee that PRO2 will assign an official any number of games or any games at all. The churn rate of turnover each year is approximately 20%, factoring in individuals who move up to the bargaining unit and

those who drop out or are released from the program. This factor weighs against employee status.

7. PRO2 Officials Receive Match Fees Largely From The Leagues

The Board in *PIAA* concluded that the payment of match fees “do indeed point toward independent contractor status” noting that payment was made on a per game basis with no withholdings deducted. *Id.*, Slip op. 7. However, the Board noted the significance of this was “reduced by the fact PIAA provides some types of insurance” to the officials *Id.* The Board also found that PIAA’s “control over officials’ compensation system outweighs the considerations supporting independent contractor status.” *Id.*

The situation with PRO2 officials is not comparable. PRO does not set the match fees, the leagues do. PRO2 has no control over the match fees all of which are paid in a flat fee without withholdings. The PRO2 officials get the benefits of not having taxes and social security and other withholdings and also can claim as business expenses their uniforms and other equipment.

While PRO2 can advocate for higher fees, the league makes the ultimate determination. There is no distinction among the amounts paid for a Tier A-D official. All fees for USL1, USL Championship and NWSL matches are paid to the PRO2 official directly by the leagues, with the exception of MLS matches assigned to PRO2 officials. The MLS matches are paid without withholding and the PRO2 official is given an IRS Form 1099 which says “Non-Employee Compensation” on it.

The Board discounted this factor based on the fact the PIAA provided insurance to officials. There is no such mitigating element here: PRO2 provides no insurance.

In sum, there are important distinctions between this case and the employer in *PIAA*, which had ultimate control over all aspects of compensation such that this factor cannot weigh in favor of employee status.

8. The Work of Officiating is Part of the Business but Is Not Part of the Business of Soccer

PRO was founded to employ professional referees full-time and to comply with certain FIFA regulations about officials. A pool of qualified professional officials is provided to MLS. There is no requirement that PRO provide such referees to USL or NWSL. Indeed, PRO2 officials can be assigned matches by national assignors and are free to take on any other matches in any soccer organization or league. There are many other leagues at the state, regional and college level for which officials can work matches.

It is obvious all 8 of the factors identified in *FedEx* weigh in favor of independent contractor status. Simply put, there is no employment relationship between PRO2 and the individuals sought in the petition. In any event, as noted above, the economic element—such as it exists—is between the leagues and the officials. The PRO2 officials would possibly be considered independent contractors of the leagues and their relationship with PRO is even less related to the statutory definition of employee.

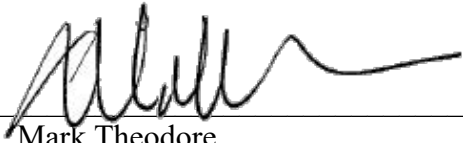
III. CONCLUSION

For all the foregoing reasons, the Regional Director should dismiss the Petition in this case.

Date: September 30, 2021

Respectfully submitted,

PROSKAUER ROSE LLP

By: 
Mark Theodore
Attorneys for
Professional Referee Organization, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the county of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2029 Century Park East, 24th Floor, Los Angeles, CA 90067-3010.

On September 30, 2021, I served the following document(s), described as:

POST-HEARING BRIEF OF PROFESSIONAL REFEREE ORGANIZATION, INC.

☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

Lucas K. Middlebrook, Esq.
SEHAM, SEHAM, MELTZ & PETERSON, LLP
199 Main Street, 7th Floor
White Plains, NY 10601
Telephone: (914) 997-1346
Email: lmiddlebrook@ssmplaw.com

☒ (By Electronic Mail) By transmitting a true and correct copy thereof via electronic mail to the served parties.

☐ (By Mail) I am "readily familiar" with the Firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (By Personal Service) By handing over such envelope to the addressee in court.

☐ (By Overnight Delivery) By causing such envelopes to be delivered by the office of the addressee by OVERNIGHT DELIVERY via Federal Express or by other similar overnight delivery service.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 30, 2021, at Los Angeles, California.

Robert Linton
Type or Print Name



Signature

PROOF OF SERVICE